Petition

81-1986
No.

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In the Supreme Court of the United States

October Term, 1981

ATTORNEY GENERAL OF OHIO, INTERVENOR,
Petitioner,

vs.

ARTHUR KRAUSE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
614/466-3376

BURT FULTON, *Counsel of Record*
Sixth Floor, Bulkley Building
Cleveland, Ohio 44115
216/241-5310
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Should privileged documents produced by state investigatory agencies pursuant to court-ordered discovery rulings [which documents were not used at trial] be returned to the producing agencies at the conclusion of the litigation rather than made available for public dissemination.

2. Do the privacy rights of individuals questioned during investigation by state agencies as well as the need for confidentiality of privileged state investigative files outweigh the justification for public dissemination of voluminous investigative documents which did not become a part of the trial record.

3. Should a Federal Court apply the same standard for public dissemination of a state agency's records as it applies in determining whether such records are discoverable by the parties under Federal Rules when such standard permits the Federal Courts to become the conduit and source for supplying the media with material for dissemination to the public.

LIST OF PARTIES

The petitioner is the Attorney General of the State of Ohio on behalf of the Ohio National Guard, the Ohio Bureau of Criminal Investigation and the Ohio Highway Patrol, Columbus, Ohio 43215. Petitioner was the intervenor-appellant in the court below. Petitioner is represented by Burt Fulton, Sixth Floor, Bulkley Building, Cleveland, Ohio 44115.

Respondents are the plaintiffs-appellees in the courts below who are represented by Sanford Jay Rosen, 155 Montgomery Street, 8th Floor, San Francisco, California 94104.

Intervenor Peter Davis was also represented in the court below by Sanford Jay Rosen, 155 Montgomery Street, 8th Floor, San Francisco, California 94104.

Intervenor-appellant Kent State University was represented in the courts below by Shimon Kaplan, 1500 Leader Building, Cleveland, Ohio 44114.

The United States of America, also an intervenor in the court below, was represented by Patrick McLaughlin, 400 U. S. Courthouse, Cleveland, Ohio 44114.

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OPINIONS BELOW

Orders of District Court Judge Don J. Young appears in the Appendix at pages A19-A36.

Orders of District Court Judge William K. Thomas appears in the Appendix at pages A37-A71.

Opinion of the Court of Appeals for the Sixth Circuit appears in the Appendix at pages A1-A17.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit was entered on February 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rules 17 and 19 of the Supreme Court Rules, effective June 30, 1980. A Stay of Mandate was ordered March 19, 1982 (A72).

CONSTITUTION AND STATUTES INVOLVED

U. S. Constitution, First Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Ohio Revised Code §149.43, Availability of Public Records (A73).

Ohio Revised Code Chapter 1347, Personal Information Systems (A74).

Rule 26(b)(1), Civil Rules of Procedure, provides in pertinent part:

> (b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

This writ is sought by Intervenor, the Ohio Bureau of Criminal Investigation (BCI), the Ohio State Highway Patrol and the Ohio National Guard, who were not parties during the trial of consolidated cases *Krause, et al. v. Rhodes, et al.*, No. C70-544.

For clarity's sake the various agencies involved have designated themselves as Petitioner.

The appeal focuses upon discovery materials obtained in preparation for but not introduced during the two civil trials in the *Krause* matter.

Petitioner maintains that certain materials from the files of the BCI, the Ohio State Highway Patrol and the Ohio National Guard should be returned to the originating agency which was required to produce the documents by the District Court as part of its discovery order. Further, Petitioner urges that such documents should not be permitted to be publicly disseminated.

This petition does not address itself to discovery documents which were introduced at trial and accepted by the District Court as proper evidence and made part of the trial record.

Background of Litigation

The *Krause* matter was a consolidation of wrongful death and personal injury suits arising out of the May 4, 1970 shooting incident which occurred on Blanket Hill at Kent State University.

As a result of the tragic events of May 4, 1970, a myriad of legal actions were instituted. Initial civil suits filed against individuals and the State of Ohio were dismissed

at the trial court level. Appeals followed regarding the liability issue of a state under the doctrine of sovereign immunity as well as the question of the individual liability of defendants acting at the time under color of state law in attempting to maintain civil order.

The finding and conclusion of the Ohio State Grand Jury which investigated the incident was subsequently reviewed by the District Court. Prior to the commencement of the civil actions, criminal proceedings were instituted against certain members of the Ohio National Guard. All defendants in the criminal matter were exonerated by the District Court at the conclusion of the Government's case.

During commencement of the first civil trial, CBS instituted proceedings against District Judge Don Young claiming his "gag order" was in violation of the United States Constitution.

The first civil trial lasted fifteen weeks and resulted in verdicts in favor of all defendants. On appeal, these verdicts were reversed for the reason that the District Court improperly handled an alleged threat to a juror.

The second civil trial commenced in late 1978 and terminated in settlement during the early part of 1979. Certain decisions of the District Court relating to this settlement include the question raised by this petition.

Background of Events

In deciding this petition, this Court must remember the tumultuous, turbulent decade of the 1960's. The war in Southeast Asia, general social discontent and violent protests, particularly on campuses, focused national attention on the demonstrations at Kent State University in the Spring of 1970. The demonstrations attracted many non-students to the campus in Kent, Ohio. Included were

university and non-university youths, curious adults, members of the media, law enforcement personnel plus members of various state, federal and local governmental agencies.

Following the May 4 tragedy, an immediate, intensive investigation began. Agencies involved included the Ohio State Highway Patrol, the BCI, the State Arson Department, the City of Kent Police Department, the Kent State University Police Department, the Ohio National Guard, the Federal Bureau of Investigation and the Department of Justice.

This background of events greatly affects the issue presented. The events of May 4, 1970 and the resulting litigation were both explosive and unique. While perhaps the passage of time has softened the emotional outcry regarding the unfortunate events of May 4, 1970, any judicial decision relating to those events uniformly receives media dissemination.

By reason of this, a decision governing the public dissemination of Kent State discovery materials has important precedential value not only from a technical legal point of view, but as a future guideline governing the ability of governmental agencies to conduct critical investigative functions.

The documents now required to be publicly disseminated were produced by law enforcement agencies as a result of their interviews with countless witnesses to the events. The investigation required that all informational possibilities be explored.

The very nature of the documents which include hearsay, speculation and irrelevancies points to the wide range of questioning enlisted by various investigative agencies

as well as the wide range of the stories elicited from witnesses.

The extensive investigations conducted at Kent State by the many agencies involved resulted in volumes of material, much of which proved to be unrelated to the issues which were litigated. The abundant fruits of liberal discovery is in sharp contrast with the limited number of documents relied upon in the various civil and criminal suits.

Background of Discovery Rulings
First Civil Trial

The unique circumstances under which discovery was conducted in the civil suits gives rise to serious policy considerations in regard to the public dissemination of materials obtained through discovery.

Judge Don Young (the initial trial judge) consistently held that the discovery was to be open, broad and far-reaching. At no time, however, did he suggest public dissemination of the material. Reacting to various discovery requests and motions for protective orders in response thereto, Judge Young struck a balance between the litigants' need for the requested information and the possibility of harm or injustice to the others. For example, discovery was permitted, but a contemporaneous protective order was imposed by Court orders entered in 1974 and 1975 sealing certain depositions (App. pp. A19-A30).

The District Court held that all information which might prove relevant would be subject to discovery. Thus, documents and reports which were entitled to a claim of privilege were ordered to be produced. See the Court's orders of February 13, 1975 and March 25, 1975 (App. pp. A23 and A25).

In this spirit of complete discovery, Judge Don Young on May 16, 1975, ordered that plaintiffs be granted access to a transcript of the testimony of all witnesses appearing before the Federal Grand Jury which returned the indictments in *United States v. Shafer* (App. pp. A30-A33). (N.D. Ohio, 1974), 384 F. Supp. 496.

The Court's philosophy was articulated during litigation. Judge Young stated:

> "In the heavy fog of emotion which engulfs [this case], seeing objectively what really happened will be difficult at best. No scrap of information available to anyone involved should be held back until the time of trial." (App. p. A27.)

The Court was aware that while large volumes of material would be produced, only a small portion of that material ultimately would be relevant. Judge Young stated:

> "In order to sort the wheat from the chaff in this case, many bushels of hearsay and opinion will have to be winnowed in order to produce a few grains of admissible evidence." *Krause v. Rhodes* (N.D. Ohio, 1975), 390 F. Supp. 1072, 1074.

In March, 1975, the Court added:

> "Already in this case the Ohio National Guard, the Ohio State Highway Patrol, the Justice Department and the Federal Bureau of Investigation *have opened their files* in order to assure that both sides are in possession of all facts, thus expediting the search for the truth . . . It is important that no fact, however ostensibly unimportant or irrelevant, which pertains to the events surrounding this case be withheld." (Emphasis added; App. pp. A26-A27.)

The purpose of discovery was fulfilled through the Court's "open file" approach. The various state and federal agencies had "opened their files." No scrap of information however unimportant or irrelevant, was withheld. Appellants had access to *all* information from the files of various agencies prior to trial. The parties to the civil litigation were free to use whatever information they chose in preparation for their case and to offer at trial whatever documents and exhibits they deemed relevant.

Motions to quash and for protective orders were promptly filed by agencies whose documents were the subject of discovery. In early 1975, counsel for Kent State University in behalf of certain witnesses objected to the depositions and urged that the discovery be permitted to be used by Respondents' counsel only in preparation for their case.

Respondents' counsel argued that no limitation be placed upon the discovery documents in order to best serve "future journalists and historians." The die had been cast regarding the desire of certain parties to insist on public dissemination of all discovery materials.

The District Court granted the Motion on behalf of the witnesses and instructed counsel to prepare a protective order broad enough to encompass all parties, stating:

". . . enough to apply to all the parties to this litigation . . .

> I think that those matters on discovery are the property, perhaps, of the parties and their counsel, but only for the purposes of the case, and that *beyond the purposes of the case I don't think that those belong to anybody except the persons that their materials*

were produced, they are the materials of the people that produced them." (Emphasis added; App. pp. A17-A18.)

Following the first trial, the District Court on September 15, 1976 overruled a motion to vacate the protective order which was filed by Respondents' counsel (App. p. A34).

Background of Rulings
Second Civil Trial

The second civil trial began in December, 1978 before Judge William K. Thomas. The matter was finally concluded in early 1979, the Court reserving jurisdiction to consider certain matters.

Reacting to Plaintiffs' Renewed Motion to Amend and Vacate Protective Order, District Judge William K. Thomas on February 28, 1979 concluded that the protective order of June 24, 1976 should not be extended beyond the termination of the litigation. Rather, each category of discovery materials was to be considered individually and a new protective order fashioned. The Court's rulings of February 28, 1979 and March 12, 1979 are the subject of this Petition (App. pp. A37-A71).

In the February 28, 1979 Memorandum, Judge Thomas stated:

"Judge Young's 'open file' discovery policy, admirable as it may have been in the preparatory stage of these cases, does not permit this court to shirk its responsibility to preserve 'the public interests in the functioning of the discovery process,' now that the cases are winding down. *The policy of 'open file' discovery was not intended to serve as a vehicle to enlarge the public domain, laudable though that goal is. To*

permit the discovery process to serve that extraneous purpose would not encourage its acceptance or improve the 'functioning of the discovery process'." (Emphasis added; App. pp. A42-A43.)

Subsequent orders of the District Court did, however, serve to enlarge the public domain.

REASONS FOR GRANTING THE WRIT

I. The Materials Obtained Through Discovery Served the Purpose for Which They Were Obtained, i.e., Preparation for Litigation, and Should Now Be Returned to the Agency Which Produced Them.

All information contained in the investigatory files of the BCI, the Ohio State Highway Patrol and the Ohio National Guard was made available to the Respondents in preparation for litigation. Judge Don Young noted in February, 1975, that these agencies had *"opened their files* in order to assure that *both sides are in possession of all facts,* thus expediting the search for the truth" (Emphasis added; App. p. A26).

The rationale behind broad discovery is to insure that all parties have the facts necessary to present their cause at trial. The rules of discovery contemplate giving litigants access to all facts, testimony and documents which may be of assistance in trial preparation. Courts frequently state that the underpinning of liberal discovery is the search for the ultimate truth; that a trial should not be "a game of blindman's buff." *Mitchell v. Roma* (3rd Cir. 1959), 265 F.2d 633, 636.

The spirit of liberal discovery was complied with by the various State agencies. However, the BCI, the Ohio

State Highway Patrol and the Ohio National Guard in producing their files did not anticipate the ultimate public dissemination of these materials.

The Court in *Hecht v. Pro-Football, Inc.* (D.C. 1969), 46 F.R.D. 605, 607 stated:

> "Modern civil procedure in the Federal courts contemplates liberal disclosure. Discovery is in the interest of justice. Nevertheless, discovery is not unbridled and not unlimited. There must be restrictions to protect individuals in their natural privacy."

Much of the material produced as a result of the Order of Judge Thomas contains sensitive statements made by third parties, photographs and reports made without the knowledge or consent of the person being photographed or reported upon.

Placing such materials into the public domain no longer can serve the basic legal rights of the litigants. These issues have been resolved by trial and ultimate settlement.

To now permit wholesale public viewing of these materials intrudes into the privacy and confidentiality of third parties who did not testify at any of the trials involving Kent State. No useful purpose can be served by public dissemination of these documents. Plaintiffs as well as other parties to the litigation have benefited from the liberal discovery. This having been accomplished, all documents not utilized in Court should be returned to the respective State agency which produced them.

II. The Scope of Discovery in Krause Gives Rise to Serious Policy Considerations Which Outweigh the Justification for Public Dissemination of Materials Which Were Not a Part of the Trial Record.

The "open file" discovery in *Krause* produced "many bushels of hearsay and opinion" which were eventually "winnowed in order to produce a few grains of admissible evidence." *Krause v. Rhodes* at 1074. To disseminate to the public these bushels of hearsay and opinion under the quasi-judicial guise of having been obtained through judicial fiat is misleading to the public since the materials would be afforded a false aura of judicial respectability.

Moreover, the discovery material came from the files of State agencies involved in investigatory capacities. For example, Respondents had in their possession 3,502 pages from the files of the Ohio State Highway Patrol and 2,849 pages from the Bureau of Criminal Investigation. These agencies basically perform a police role in the functioning of the State of Ohio.[1] As such, the public has a compelling interest to insure that these agencies are able to fully perform their duties.

Reasons of public policy support the general proposition that police reports and statements from informants must be kept confidential. *Schuster v. New York* (1959), 25 Misc. 2d 916, 203 N.Y.S.2d 278; *Schuster v. New York* (1959), 20 Misc. 2d 516, 191 N.Y.S.2d 884; *Gonzales v.*

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1. The duties of the BCI are set forth at 109.52, Ohio Revised Code:

> The bureau of criminal identification and investigation may operate and maintain a criminal analysis laboratory and mobile units thereof, create a staff of investigators and technicians skilled in the solution and control of crimes and criminal activity, keep statistics and other necessary data, assist in the prevention of crime, and engage in such other activities as will aid law enforcement officers in solving crimes and controlling criminal activity.

State of Florida (Fla. App. 1977), 352 S.2d 944; *Mitchell v. Roma* (3rd Cir. 1959), 265 F.2d 633; *Wooster Republican Printing Company v. City of Wooster* (1978), 56 Ohio St. 2d 126.

The reports, statements and documents were produced by law enforcement agencies as a result of interviews with hundreds of witnesses. Future policy considerations dictate that the nature of investigative work requires that all possible sources of information be explored. During investigations, witnesses will be less receptive to full disclosure if they believe that their remarks and statements will be publicly disseminated.

It is accepted that in questions of discovery, the need for confidentiality of police records must be balanced against the litigant's need for the material he seeks; that in many instances, the policy of confidentiality must yield to the policy of liberal discovery. That balancing occurred in this case prior to trial and was weighed in favor of disclosure. The litigant's need for this material, however, has been extinguished with the settlement and dismissal of the action.

By reason of the settlement, there is no need to balance the individual's right to information against the necessity of confidentiality of police records. While the litigant's need for the materials has ceased, the necessity of confidentiality of police records remains.

To permit the discovery materials not used in trial to be publicly released simply because they have been obtained through the discovery process would have a chilling effect upon the ability of law enforcement agencies to effectively develop future investigations.

III. The Standard for Obtaining Discovery Materials Is Not the Same As the Standard for Public Disclosure of a State Agency's Records; the Trial Court Improperly Applied an Incorrect Standard in Reaching Its Decision.

Respondents received copies of the files of the BCI, the Ohio State Highway Patrol and the Ohio National Guard through depositions and subpoenas duces tecum pursuant to Rule 26 of the Federal Rules of Civil Procedure. The scope of discovery contemplated by the rules is set forth in Rule 26.

The showing which must be made by a litigant to obtain documents through discovery is not great for two reasons. First, there is a strong policy which favors liberal disclosure as a vehicle for ascertaining the truth. Secondly, although the parties and counsel may be permitted access to materials which are irrelevant and inadmissible, there is no possibility of this information reaching the jury due to the Court's role in determining what is proper evidence for a jury. By reason of this, the standard which a litigant must establish to gain discovery is not high.

A different standard from that applied in discovery situations exists where an individual seeks access to records maintained by an agency of the state. Since the District Court's Order of March 12, 1979 deals not with the discovery of these documents but with their dissemination, the applicable test for making a determination as to dissemination is found not in the Federal Rules of Civil Procedure, but in the applicable state statutes dealing with public records and the right to privacy.

If Respondents seek the files of the BCI, the Ohio State Highway Patrol and the Ohio National Guard not

for the purpose litigation but for personal reasons and to insure public dissemination, the proper mode of acquisition is through a request pursuant to the Ohio Revised Code, §149.43 (A. A73-A74):

In considering the types of documents requested and the test to be applied when considering "disclosure to the general public," a Court must balance the public's right to know embodied in Ohio Revised Code §149.43 against the individual's right of personal privacy, codified in Chapter 1347 of that Code (A. A75-A76).

In the case at hand, the right to privacy of hundreds of persons is at issue. The release of thousands of pages of reports, statements and interviews which were never a part of a trial record would affect those who were interviewed or whose names were mentioned by others. While redaction of names is a step toward preserving that right to privacy of these individuals, it does not guarantee that the protection would be adequate.

Perhaps Respondents mustered sufficient showing regarding discoverability of the files of the State agencies but they have not met the requisite burden to permit public disclosure of those materials not introduced into evidence and made part of the record in the civil trials.

Respondents urged that discovery materials have been "intermingled" in their files; that it would be virtually impossible to separate these documents from attorneys' work product. (It should be noted that while Appellees maintain they cannot separate the materials in order to return them permanently to the agencies, they are able to return them to the agencies for redaction.) This "intermingling" clearly does not place the documents in the public record. Attorney work product is not part of the public domain.

Respondents also raised the specter of "cover-up" charges. They urged that only by complete public dissemination can the "inevitable suspicions of a 'cover-up' of the Kent State affair" be eliminated. Such references are absurd when one considers that it was the decision of Respondents' counsel as to which documents would be utilized at trial.

The public dissemination of discovery materials in *Krause* which were not permitted as evidence and made part of the trial record would be contrary to established public policies and the purposes of the Federal Rules of Civil Procedure.

This Court has the power to regulate the public dissemination of materials obtained through discovery. In *International Products Corporation v. Koons* (2d Cir. 1963), 325 F.2d 403, 407, the Court referred to the "equitable powers of courts of law over their own process." See also *Rodgers v. United States Steel Corp.* (3rd Cir. 1976), 536 F.2d 1001.

Discovery is intended to permit parties to produce facts upon which the trier of such facts can arrive at a just resolution of the issues. It is not intended to generate information for magazine articles, reviews and television mini-series.

No rule of procedure nor principle of law condones the use of courts for such a purpose. If there is a right of access to the materials in dispute, it is through a request pursuant to the Ohio Revised Code, §149.43.

To permit the news and television media, under the guise of Rule 26 discovery, to gain access to privileged material would be a nefarious inroad into the protection of parties who are required to disgorge all facts relevant to

themselves under the broad discovery procedures now implemented in Federal Courts.

Federal Courts are the arenas for the just and fair determination of legal issues. The Federal Court system was not founded nor was its use intended as an arm of Madison Avenue or as an outlet for public entertainment.

CONCLUSION

For these reasons, the Petitioner urges that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
614/466-3376

BURT FULTON, *Counsel of Record*
Sixth Floor, Bulkley Building
Cleveland, Ohio 44115
216/241-5310
Attorneys for Petitioner

Appendix

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed February 18, 1982)

Nos. 79-3640 and 79-3642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs-Appellees,

v.

JAMES A. RHODES, *et al.*,
Defendants.

ATTORNEY GENERAL OF OHIO, FOR THE OHIO HIGHWAY PATROL, BUREAU OF CRIMINAL INVESTIGATION AND OHIO NATIONAL GUARD,
Intervenors-Appellants,

and

KENT STATE UNIVERSITY,
Appellant.

Appeal From the United States District Court for the Northern District of Ohio, Eastern Division.

Before: EDWARDS, *Chief Judge*, LIVELY, *Circuit Judge*, and PHILLIPS, *Senior Circuit Judge*.

EDWARDS, *Chief Judge*. In these cases we deal with appeals from certain public disclosure orders entered by

then U.S. District Judge William Thomas[1] in the Northern District of Ohio in the aftermath of the tragic events of May 4, 1970 on the campus of Kent State University. The civil damage actions filed by the injured and the survivors of those killed by the Ohio National Guard during the riotous events of that week have now been settled. *See Krause v. Rhodes*, 640 F.2d 214 (6th Cir. 1981).[2] But the interest of some of the parties, some historians and the news media continues unabated and has produced this litigation.

The Attorney General of Ohio has filed a careful and accurate statement of facts which supply the background of this appeal.

> In deciding this appeal, This Court must remember the tumultuous, turbulent decade of the 1960's. The war in Southeast Asia, general social discontent and violent protests, particularly on campuses, focused national attention on the demonstrations at Kent State University in the Spring of 1970. The demonstrations attracted many non-students to the campus in Kent, Ohio. Included were university and non-university youths, curious adults, members of the media, law enforcement personnel plus members of various state, federal and local governmental agencies.

---

1. Judge Thomas took senior status on February 15, 1981.

2. The complete history of these events and their aftermath is written in the following cases: *Krause v. Rhodes*, 471 F.2d 430 (6th Cir. 1972), *rev'd sub nom. Scheuer v. Rhodes*, 416 U.S. 232 (1974), appeal after remand, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *C.B.S., Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Krause v. Rhodes*, 390 F.Supp. 1072 (N.D. Ohio 1975); *Krause v. Rhodes*, 390 F.Supp. 1070 (N.D. Ohio 1974); *United States v. Shafer*, 384 F.Supp. 496 (N.D. Ohio 1974); *Hammond v. Brown*, 323 F.Supp. 326 (N.D. Ohio), *aff'd*, 450 F.2d 480 (6th Cir. 1971); *Krause v. State*, 31 Ohio St.2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972), *reh. denied*, 410 U.S. 918 (1973).

Following the May 4 tragedy, an immediate, intensive investigation began. Agencies involved included the Ohio State Highway Patrol, the BCI, the State Arson Department, the City of Kent Police Department, the Kent State University Police Department, the Ohio National Guard, the Federal Bureau of Investigation and the Department of Justice.

This background of events greatly affects the issue presented on appeal. The events of May 4, 1970 and the resulting litigation were both explosive and unique. While perhaps the passage of time has softened the emotional outcry regarding the unfortunate events of May 4, 1970, any judicial decision relating to those events uniformly receives media dissemination. By reason of this, a decision governing the public dissemination of Kent State discovery materials has important precedential value not only from a technical legal point of view, but as a future guideline governing the ability of governmental agencies to conduct critical investigative functions.

The documents now required to be publicly disseminated were produced by law enforcement agencies as a result of their interviews with countless witnesses to the events. The investigation required that all informational possibilities be explored.

The very nature of the documents which include hearsay, speculation and irrelevancies points to the wide range of questioning enlisted by various investigative agencies as well as the wide range of the stories elicited from witnesses.

The extensive investigations conducted at Kent State by the many agencies involved resulted in volumes of material, much of which proved to be un-

related to the issues which were litigated. The abundant fruits of liberal discovery is in sharp contrast with the limited number of documents relied upon in the various civil and criminal suits.

Background of Discovery Rulings
First Civil Trial

The unique circumstances under which discovery was conducted in the civil suits gives rise to serious policy considerations in regard to the public dissemination of materials obtained through discovery.

Judge Don Young consistently held that the discovery was to be open, broad and far-reaching. At no time, however, did he suggest public dissemination of the material. Reacting to various discovery requests and motions for protective orders in response thereto, Judge Young struck a balance between the litigant's need for the requested information and the possibility of harm or injustice to the others. For example, discovery was permitted, but a contemporaneous protective order was imposed by Court orders entered in 1974 and 1975 sealing certain depositions (App. pp. 45-46, 51-52).

The District Court held that all information which might prove relevant would be subject to discovery. Thus, documents and reports which were entitled to a claim of privilege were ordered to be produced. See the Court's orders of February 13, 1975 (App. pp. 65-66) and March 25, 1975 (App. pp. 70-72) in which motions to quash subpoenas duces tecum filed on behalf of the State agencies and the university were denied.

In this spirit of complete discovery, Judge Don Young on May 16, 1975, ordered that plaintiff be

granted access to a transcript of the testimony of all witnesses appearing before the Federal Grand Jury which returned the indictments in *United States v. Shafer, supra* (App. pp. 82-83).

The Court's philosophy was articulated during litigation. In a Memorandum filed February 20, 1975, Judge Young stated:

> "At the outset, it ought to be understood that this Court is a firm adherent to the concept of 'open file' discovery. The Federal Rules of Civil Procedure are based upon the idea that a trial is a search for truth, not a game or a battle of wits. Some four decades of practical experience have convinced this Court that the need for trial frequently disappears once both sides have a full and complete understanding of the facts. . . . In the heavy fog of emotion which engulfs [this case], seeing objectively what really happened will be difficult at best. No scrap of information available to anyone involved should be held back until the time of trial." (As repeated by the Court in its March 25, 1975 order; App. pp. 70-71.)

The Court was aware that while large volumes of material would be produced, only a small portion of that material ultimately would be relevant. Judge Young stated:

> "In order to sort the wheat from the chaff in this case, many bushels of hearsay and opinion will have to be winnowed in order to produce a few grains of admissible evidence." *Krause v. Rhodes* (N.D. Ohio, 1975), 390 F. Supp. 1072, 1074.

In March, 1975, the Court added:

> "Already in this case the Ohio National Guard, the Ohio State Highway Patrol, the Justice Department and the Federal Bureau of Investigation *have opened their files* in order to assure that both sides are in possession of all facts, thus expediting the search for the truth . . . It is important that no fact, however ostensibly unimportant or irrelevant, which pertains to the events surrounding this case be withheld." (Emphasis added; App. pp. 70-71.)

The purpose of discovery was fulfilled through the Court's "open file" approach. The various state and federal agencies had "opened their files." No scrap of information, however unimportant or irrelevant, was withheld. Plaintiffs-Cross Appellants had access to *all* information from the files of various agencies prior to trial. The parties to the civil litigation were free to use whatever information they chose in preparation for their case and to offer at trial whatever documents and exhibits they deemed relevant.

Motion to quash and for protective orders were promptly filed by agencies whose documents were the subject of discovery. In early 1975, counsel for Kent State University in behalf of certain witnesses objected to the depositions and voiced their concern that the discovery be used by plaintiffs' counsel solely in preparation for their case. The Court on April 24, 1975 granted the witnesses leave to file a motion for protective order (App. pp. 75-77).

A hearing on that Motion was held on August 20, 1975. Plaintiffs' counsel argued that no limitation be placed upon the discovery documents in order to best serve "future journalists and historians" (App. pp.

109-117). The die had been cast regarding the desire of certain parties to insist on public dissemination of all discovery materials.

The District Court granted the Motion on behalf of the witnesses and instructed counsel to prepare a protective order broad enough to encompass all parties stating:

> "I have read that motion and the memorandum in support of it, and I feel that that is a motion that in fairness not only to these particular witnesses who filed the motion, but the ruling ought to be broad enough to apply to all the parties to this litigation, that what is on the record, what was in evidence here in Court or even what was offered in evidence here in Court and was excluded, I think is properly in the public domain, but *I made very broad orders of discovery* and, of course, even in the absence of the broad order of discovery, the rules of discovery are extremely broad and they permit counsel on discovery far-ranging exploration, and to force the production of lots of material and to ask lots of questions and compel lots of answers to them.
>
> I think that those matters on discovery are the property, perhaps, of the parties and their counsel, but only for the purposes of the case, and that *beyond the purposes of the case I don't think that those belong to anybody except the persons that their materials were produced, they are the materials of the people that produced them.*" (Emphasis added; App. pp. 110-111.)

Following the first trial, the District Court on September 15, 1976 overruled a motion to vacate the protective order which was filed by plaintiffs' counsel (App. pp. 95-97).

Background of Rulings
Second Civil Trial

The second civil trial began in December, 1978 before Judge William K. Thomas. The matter was finally concluded in early 1979, the Court reserving jurisdiction to consider certain matters.

Reacting to Plaintiffs' Renewed Motion to Amend and Vacate Protective Order, District Judge William K. Thomas on February 28, 1979 concluded that the protective order of June 24, 1976 should not be extended beyond the termination of the litigation. Rather, each category of discovery materials was to be considered individually and a new protective order fashioned. The Court's rulings of February 28, 1979 and March 12. 1979 are the subject of this appeal (App. pp. 270-305, 309-315).

The Attorney General's brief also makes a reasonable statement of the legal issue as Ohio sees it.

Following the second Kent State civil trial, Judge William K. Thomas, in his March 12, 1979 Order directed that counsel should return to the United States Attorney all copies of the Federal Grand Jury testimony produced in *United States v. Shafer, supra.* The Court ordered that all copies of testimony given before the Portage County Special Grand Jury that investigated the Kent State incident be returned to the Clerk of Courts of Portage County; and further ordered the return of all 201 (Personnel) Files of defendant Guardsmen to the Ohio National Guard.

Appellants do not take issue with these portions of the Court's Order and urge for the reasons set forth in the Opinion of Judge William K. Thomas that his

Order dealing with Federal and State Grand Jury testimony as well as 201 Files be affirmed.

Appellants do maintain that the District Court's Order unconditionally releasing to the public domain discovery materials produced by the BCI, the Ohio State Highway Patrol and the Ohio National Guard should be reversed and an order entered directing all counsel and parties to return to the respective State agencies all copies of reports, statements, memoranda and investigative material which were obtained through the discovery process but which were not admitted into evidence and made part of the record in either civil trial.

Plaintiffs' brief provides a few more background facts in a succinct statement of the case:

STATEMENT OF THE CASE

This consolidated appeal is brought by Kent State University, the Ohio Bureau of Criminal Identification (BCI), the Ohio State Highway Patrol and the Ohio National Guard (collectively the appellants) from an Order of the United States District Court for the Northern District of Ohio, Eastern Division (Thomas, J.) on March 12, 1979 in Case No. C70-544. That Order vacated the June 24, 1976 Protective Order of the Court (Young, J.) which barred the public dissemination of documents acquired through discovery by the parties in the underlying Kent State civil cases and all deposition testimony, which had not become part of the official record of the case, except with the written permission of the person testifying [or] the organization producing the documents.

The Order of March 12, 1979 was carefully drafted by the District Court after it considered the interest of all parties and entities involved. Indeed, before entering its Order, the District Court conducted evidentiary and other proceedings in open court on parts of six days,[1] conducted its own investigation, considered numerous affidavits and other exhibits, and explained its actions in a careful Memorandum and Order.

The March 12, 1979 Order permits the dissemination of the majority of the discovery materials, through requiring in many instances, redaction from the documents of the names and witnesses, interviewing officers and third parties. The inherent reasonableness of the court's approach essentially was recognized by the U.S. Justice Department, whose "investigative" materials FBI "302" Statements are covered by the Order. Unlike the appellants, the United States has determined not to appeal the District Court's Order. (See e.g., App. Vol. 2 p. 775.)

The appellants are not satisfied by the protection afforded by redaction and seek the return of all documents and materials to the originating agencies where they would be stored—and shut away from the public view—or perhaps destroyed. The plaintiffs in the underlying action, their attorneys, their legal workers and Peter Davies (collectively appellees) seek to keep these materials in the public domain where they reposed until the entry of the June 24, 1976 Protective Order which was vacated on March 12, 1979.

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1. The Transcripts of these six days of proceedings are found in Volume 2 of the Appendix: January 9 (pp. 361-98); January 15 (pp. 399-464); January 17 (pp. 456-599); January 18 (pp. 600-736); February 6 (pp. 737-772) and March 9 (pp. 773-817).

It is clear to us that Judge Thomas has proceeded in this case with complete awareness of the conflicting rights of the opposing parties. He has sought with extraordinary industry to examine the massive records involved here, to protect state and federal grand jury secrecy provisions, to protect legitimate law enforcement interests, and to protect the privacy rights of individuals. In this regard, he has returned all copies of the federal grand jury testimony to the U.S. Attorney. No appeal was taken from this order. He has also ordered that all copies of the Portage County special grand jury testimony be returned to the Clerk of the Courts for Portage County Common Pleas Court. No appeal has been taken from this order. He has ordered return to the National Guard of Ohio all of the personnel files of the defendant guardsmen. No appeal has been taken from this order.

As to the balance of the materials which had been open to plaintiffs for discovery purposes as a result of the original trial judge's open-file policy, he has ordered public disclosure because of First Amendment interests and the historic nature of the events portrayed in the materials concerned. He has, however, ordered redaction of all names of witnesses supplying statements to protect their individual privacy rights. He has also conducted repeated hearings to allow motions on behalf of any whose interest might be offended to allow them to show that the statements or depositions might, even as redacted, nonetheless violate privacy rights or "be used to gratify private spite or promote public scandal." No appeals have been taken from the redaction orders or the specific protective orders entered by the District Judge. Defendants-appellants and Intervenor-appellants do appeal his release of the balance of the mass of documents, statements, investigative reports and depositions after such deletions.

We now affirm the various orders involved in these appeals. They are the following:

(6) Plaintiffs' counsel shall turn over for redaction (deletion of names of witnesses, interviewing officers, and third parties):

* * *

(b) To the Ohio National Guard and the Ohio Highway Patrol, all copies of witness statements and witness interview reports obtained from those agencies;

(c) To the Ohio Bureau of Criminal Identification and Investigation (BCI), all copies of witness statements obtained from that agency.

(d) To the Kent State University Police Department (KSU PD), all copies of witness statements, interview reports and advice of rights acknowledgments (except those relating to the Norman incident) obtained from that agency, and all copies of a statement entitled "To Whom It May Concern." After redaction, each individual or agency listed above shall return to plaintiffs' counsel the reports, statements and acknowledgments.

* * *

(8) The foregoing redaction orders shall not be required with reference to statements of, interview reports of, or acknowledgments by witnesses who later testified at trial.

* * *

(10) The remaining Ohio National Guard and Ohio Highway Patrol discovery materials are unconditionally released to counsel.

(11) All the remaining BCI discovery materials are unconditionally released to counsel.

* * *

(13) All the remaining KSU PD discovery materials are unconditionally released to counsel.

(App. Vol. 1, pp. 312-314)

We recognize that we deal here with substantial issues involving emanations from the First Amendment such as the public's right to know and legitimate concern about the accurate recordation of important historical events. We also recognize the potential conflict of these principles in this case with legitimate privacy rights of many individuals and the appropriate institutional concerns of the state and law enforcement agencies herewith involved. Our task would be far more monumental, however, if in deciding this case we were not completely convinced that Judge Thomas had sought with all the industry that a judge can bring to bear to reconcile these important interests as nearly as may be. It seems clear to us that the District Judge followed the principles involved in several cases dealing with the conflict between the First Amendment and individual rights of privacy. *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *In Re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978), Justice Powell, writing for the Court, reviewed the law applicable to the sorts of problems which Judge Thomas had before him:

> It is clear that the courts of this country recognize a general right to inspect and copy public records

and documents, including judicial records and documents. In contrast to the English practice, see, *e. g., Browne v. Cumming,* 10 B. & C. 70, 109 Eng. Rep. 377 (K. B. 1829), American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, see, *e. g., State ex rel. Colscott v. King,* 154 Ind. 621, 621-627, 57 N. E. 535, 536-538 (1900); *State ex rel. Ferry v. Williams,* 41 N. J. L. 332, 336-339 (1879), and in a newspaper publisher's intention to publish information concerning the operation of government, see, *e. g., State ex rel. Youmans v. Owens,* 28 Wis. 2d 672, 677, 137 N. W. 2d 470, 472 (1965), modified on other grounds, 28 Wis. 2d 685a, 139 N. W. 2d 241 (1966). But see *Burton v. Reynolds,* 110 Mich. 354, 68 N. W. 217 (1896).

It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case. *In re Caswell,* 18 R. I. 835, 836, 29 A. 259 (1893). Accord, *e. g., C. v. C.,* 320 A. 2d 717, 723, 727 (Del. 1974). See also *King v. King,* 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit

their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N. W. 731, 734-735 (1888); see *Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (per Holmes, J.); *Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N. Y. S. 2d 355, 356 (1944); see also *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N. E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, see, *e. g.*, *Schmedding v. May*, 85 Mich. 1, 5-6, 48 N. W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A. 2d 799, 800 (N. J. Ch. 1945).

It is difficult to distill from the relatively few judicial decisions of comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case. In any event, we need not undertake to delineate precisely the contours of the common-law right, as we assume, *arguendo*, that it applies to the tapes at issue here. (Footnotes omitted).

While *Nixon v. Warner Communications* was decided on a totally different basis from any available to Judge Thomas or this court in this case, we note specifically that Judge Thomas made provisions in his handling of this case to accord with the principles of law just set forth above. As we have already pointed out, he acted carefully to prevent the records which were being sought before him from being "used to gratify private spite or promote public scandal." *Id.* at 598.

We also base our holding in this case upon the proposition just quoted above that "the decision as to access is one best left to the sound discretion of the trial court."

Judge Thomas also depended upon *In re Halkin, supra* at 191-92, where Chief Judge Bazelon, for a unanimous panel of the D. C. Circuit, held First Amendment rights attached to materials made available through the discovery process. In analyzing First Amendment interests as against privacy rights, Judge Bazelon said:

> The court must then evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious;[34] the restraining order must be narrowly drawn and precise;[35] and there must be no alternative means of protecting the public interest which intrudes less directly on expression.[36]
>
> In assessing the propriety of a protective order in each case (*i. e.*, whether there is "good cause" for an order which restricts expression), the trial court must consider and make the necessary findings on each element of the standard.

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34. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. at 844-45, 98 S.Ct. 1535; *Wood v. Georgia*, 370 U.S. at 384-85, 82 S.Ct. 1364; *Bridges v. California*, 314 U.S. at 262-63, 62 S.Ct. 190; *Chicago Council of Lawyers v. Bauer*, 522 F.2d at 249; *cf. Nebraska Press Ass'n*, 427 U.S. at 562, 96 S.Ct. 2791.

35. "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by the constitutional mandate . . . ." *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. at 183, 89 S.Ct. at 353. *See also Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

36. *Nebraska Press Ass'n*, 427 U.S. at 563, 96 S.Ct. 2791; *Carroll*, 393 U.S. at 183-84, 89 S.Ct. 347; *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

We have already pointed out above how carefully Judge Thomas sought to follow these principles. We should point out, however, that *Halkin* presented the D. C. Court with a considerably more difficult problem than we face here. *Halkin* involved a pretrial protective order, whereas here the lengthy litigation of the Kent State cases had finally come to a total settlement before Judge Thomas' post-trial orders were entered.

Finally, we conclude that Judge Thomas most certainly did not abuse his discretion. On the contrary, his orders were drafted with careful recognition of the competing interests, and he scrupulously followed the applicable law.

The judgment of the District Court is affirmed.

EXCERPT FROM TRANSCRIPT OF TRIAL

[12,004] I have read that motion and the memorandum in support of it, and I feel that that is a motion that in fairness not only to these particular witnesses who filed the motion, but the ruling ought to be broad enough to apply to all the parties to this litigation, that what is on the record, what was in evidence here in Court or even what was offered in evidence here in Court and was excluded, I think is properly in the public domain, but I made very broad orders of discovery and, of course, even in the absence of the broad order of discovery, the rules of discovery are extremely broad and they permit counsel on discovery far-ranging exploration, and to force the production of lots of material and to ask lots of questions and compel lots of answers to them.

[12,005] I think that those matters on discovery are the property, perhaps, of the parties and their counsel, but

only for the purposes of the case, and that beyond the purposes of the case I don't think that those belong to anybody except the persons that their materials were produced, they are the materials of the people that produced them. If they are depositions or transcripts of the testimony of people who were called as witnesses on discovery, what they said remains their property, having served the case, the trial now being over so far as evidence is concerned and the discovery having served its purpose, I think the people have a right to retain those for themselves and determine if to what extent at all anybody else should have any right to use them.

So I'm going to instruct Mr. Parisi that his motion is granted and that he may, with the assistance of counsel, make that broad enough to protect not only his clients but also to protect all of the other parties to this action:

That he may draw an order that anybody that wants to use any of this discovery material has to get the permission of the person who was deposed.

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 3, 1974)

KENT STATE CASES

Civil No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE,
Plaintiff,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

This cause came to be heard upon oral motion by counsel for defendant James A. Rhodes for a protective order temporarily sealing his deposition to be taken October 3 and 4, 1974. Although the defendant Rhodes has had three weeks in which to seek a protective order by means provided in the Federal Rules of Civil Procedure, because of the unique circumstances attendant to this defendant's present political activities, the Court finds that fairness to him requires that the records of the deposition should be temporarily sealed pending a formal determination of whether the protective order should be extended until a time when it would not be unfair to unseal said record of deposition.

The Court is not happy with the procedure of making ex parte telephonic motions which has been utilized twice by counsel in this matter. No further such motions will be entertained by the Court. Should counsel seek protective orders concerning discovery they shall hereafter file written motions to which the normal periods of opposition will be allowed.

For the reasons stated herein and for good cause appearing, it is

ORDERED that the court reporter taking the deposition of defendant Rhodes on October 3 and 4, 1974 should be and hereby is ordered to seal, pending further determination by this Court, all notes, transcripts and official records of the deposition; PROVIDED, HOWEVER, that the protective order entered herein shall dissolve by its own accord unless the defendant Rhodes files within five (5) days of the date of the filing of this order a formal written motion for a protective order and a memorandum in support thereof.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 22, 1974)

KENT STATE CASES
C 70-544
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE,
Plaintiff,

VS.

JAMES A. RHODES, *et al.*,
Defendants.

TYPE OF PLEADING:

Further Order Concerning Sealing of Depositions

The above pleading refers to the following case(s) as indicated by check mark(s):

[x]	A	Arthur Krause	C 70-544
[x]	B	Elaine B. Miller	C 70-816
[x]	C	Sarah Scheuer	C 70-859
[x]	D	Louis A. Schroeder	C 71-20
[x]	E	John R. Cleary	C 71-21
[x]	F	Donald MacKenzie	C 71-22
[x]	G	Douglas Wrentmore	C 71-23
[x]	H	Thomas M. Grace	C 71-24
[x]	I	James D. Russell	C 71-25
[x]	J	Alan M. Canfora	C 71-26
[x]	K	Arthur Krause	C 71-470
[x]	L	Dean Kahler	C 71-471
[x]	M	Sarah Scheuer	C 72-439
[x]	N	Robert P. Stamps	C 73-643

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

ORDER

This cause came to be heard upon motion by the Court *sua sponte* to seal all depositions in these cases during the pendency of the criminal case *United States v. Shafer*, No. CR 74-165, which is currently being tried before Chief Judge Battisti in Cleveland, Ohio. The Court, after consultation with the judge to whom the criminal case is assigned, concludes that depositions hereafter taken should be sealed until the conclusion of the criminal trial. Although discovery in these cases may proceed, any fruits of discovery must be kept out of the public record until after the conclusion of the criminal case.

For the reasons stated herein and for good cause appearing, it is

ORDERED that the depositions taken or filed after the date of the filing of this order should be and hereby are sealed under further order of this Court, and it is

FURTHER ORDERED that the court reporter or reporters taking any depositions in these cases should be and hereby are ordered to seal all notes, transcripts and official records of said depositions until further order of this Court, and it is

FURTHER ORDERED that the court reporter or reporters should be and hereby are required to retain and not distribute to any person any transcripts of any depositions which were not distributed prior to the date of the filing of this order, and also to retain and not distribute to any person transcripts of any depositions taken after the date of the filing of this order until further order of the court.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 13, 1975)

Civil C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE,
Plaintiff,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

ORDER

This cause came to be heard upon motion filed by the defendants for a protective order preventing the deposition of the custodian of records of the Ohio National Guard and the Ohio State Highway Patrol, pursuant to Rule 26(c) Fed. R. Civ. P., and to quash the subpoena duces tecum issued to the aforementioned governmental agencies, pursuant to Rule 45(b) Fed. R. Civ. P. In addition, the defendants move the Court to quash the subpoena duces tecum issued to the Clerk of the Portage County Court of Common Pleas seeking the discovery of all the documents related to the Portage County, Ohio Grand Jury. Plaintiffs have opposed this motion.

For the reasons which will be set forth in a later memorandum, good cause therefor appearing, it is

ORDERED that the motion filed by defendants for a protective order and to quash should be and hereby is overruled, and it is

FURTHER ORDERED that the trial of this case will go forward on Monday, May 19, 1975.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 25, 1975)

Civil No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This cause came to be heard upon motion by the Kent State University Police Department to quash a subpoena or, in the alternative, for a protective order. The motion was submitted with a memorandum of law and the affidavit of Robert Malone, Director of Safety, Kent State University Police Department. The movants claim that the subpoena should be quashed first, because the plaintiffs in the case have failed sufficiently to designate the particular documents to be produced and, therefore, the production would be unreasonable and oppressive. Rule 45(b) Fed. R. Civ. P. Secondly, the movants allege that the subpoena should be quashed because plaintiffs seek to inspect privileged and confidential documents.

At the outset, it should be noted that the documents supporting the motion fail to show compliance with L. Civ.

R. 3(a)(6). That alone would justify this Court in summarily overruling this motion. It would be difficult for the movants to make some of the arguments which they belabor in their brief if a good faith attempt had been to comply with this Court's rules. However, in the interests of conserving time, the Court will overlook the wrong that has been done, and consider the merits of the matter. Counsel are warned, however, not to fail to comply with the rules in the future, as sanctions will be imposed if they do.

Plaintiffs contend that the subpoena is not so vague or overly broad as to prevent the movants from examining the documents and claiming that they are, in fact, privileged. They further claim that this motion is controlled by the Court's rulings in other discovery motions in this case.

In a memorandum filed February 20, 1975, this Court stated:

> "At the outset, it ought to be understood that this Court is a firm adherent to the concept of open file discovery. The Federal Rules of Civil Procedure are based upon the idea that a trial is a search for the truth, not a game or a battle of wits. Some four decades of practical experience have convinced this Court that the need for trial frequently disappears once both sides have a full and complete understanding of the facts."

Already in this case the Ohio National Guard, the Ohio State Highway Patrol, the Justice Department and the Federal Bureau of Investigation have opened their files in order to assure that both sides are in possession of all facts, thus expediting the search for the truth. Whether the issue concerns investigative files or inter and intra-agency memoranda, the privilege asserted by the state is

conditional, not absolute. *Brown v. Thompson,* 430 F.2d 1214 (5th Cir. 1970); *Olson Rug Co. v. N.L.R.B.,* 291 F.2d 655 (7th Cir. 1961). Thus where such a privilege is claimed, a balancing approach is used. *Brown, supra.* On the one hand, the police claim that the information was collected under a veil of confidentiality and that disclosure would contravene the public interest and would impair the functioning of the police department. Plaintiffs claim, however, that the information is needed in order to prepare their case adequately and that the privilege should bow to the necessity of the truth being known about Kent State.

The Court agrees with the latter position. This is a very complicated and involved lawsuit in which there is a great deal of public interest. It is important that no fact, however ostensibly unimportant or irrelevant, which pertains to the events surrounding this case be withheld. These events are nearly five years old and memories have dimmed. Reports made at or near the time of these events are a major source of information which will assist the parties in discovering what really happened. Even with regard to the inter and intra-agency communications, the claiming of privilege will impede the investigation, gathering and weighing of information, and thus will retard the making of a fully informed judgment. *Olson Rug Co., supra.* As this Court stated in its earlier memorandum,

> "In the heavy fog of emotion which engulfs this case, seeing objectively what really happened will be difficult at best. No scrap of information available to anyone involved should be held back until the time of trial."

This is a case that may be resolved by a determination of the truth, but not by a determination that the truth shall remain hidden. *See Wood v. Breier,* 54 F.R.D. 7 (E.D. Wisc. 1972).

The movants' argument that the subpoena should be quashed because it is oppressive and unreasonable is also not well taken. They, of course, have the burden of showing the unreasonableness and it is a particularly heavy one when supporting a motion to quash rather than some more limited protection. *Westinghouse Electric Corp. v. City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965). The affidavit of Mr. Malone surely falls short of sustaining this burden. In fact, he does not state that he has been unable to obtain and review the documents requested. The fact that the Kent State Police Department is not a party to the suit holds little weight and is not a sufficient reason to quash. *Westinghouse Electric Corp., supra.* Again, as with the claim of privilege, the importance of the case is a factor to be considered and militates against quashing a subpoena. *Westinghouse Electric Corp., supra* at 767. Since this Court is not willing to quash the subpoena, the question becomes whether it should be limited in some way.

Upon examination of Appendix A to the subpoena duces tecum served upon the Kent State University Police Department's custodian of records, this Court has concluded that the requests made in paragraphs one, three, four, five and six are designated with sufficient specificity as not to be unduly burdensome or unreasonable and therefore, these requests must be complied with fully. Paragraphs two and seven, however, are overly broad and should be limited. Paragraph two should be limited to the statements of all persons purporting to have knowledge of the events occurring at or near Kent State University on, about or around May 1-5, 1970 and paragraph seven should be limited to any and all other records, documents, reports, statements or documents pertaining to any of the events occurring at or near Kent State University during the period May 1-5, 1970.

Movants finally request that they not be required to bear the cost of copying the documents, requested in the subpoena. This Court is of the opinion that such a request is reasonable. It is only necessary that movant make the material sought available to plaintiffs so that they may inspect it and make copies of the documents they want at their own cost.

Therefore, for the reasons stated herein and for good cause appearing, it is

ORDERED that the Kent State University Police Department's motion to quash the subpoena duces tecum served on it by plaintiffs should be and hereby is denied, and it is

FURTHER ORDERED that paragraph two of the subpoena be limited to the statements of all persons purporting to have knowledge of the events occurring at or near Kent State University on, about or around May 1-5, 1970 and that paragraph seven be limited to any and all records, documents, reports, statements or documents pertaining to any of the events occurring at or near Kent State University during the period May 1-5, 1970, and it is

FURTHER ORDERED that paragraphs one, three, four, five and six of the subpoena be fully complied with, and it is

FURTHER ORDERED that the Kent State University Police Department need only make the documents requested available for inspection by plaintiffs and that any copies made are to be made at plaintiffs' expense.

IT IS SO ORDERED.

/s/ DON J. YOUNG

United States District Judge

N.D. Ohio, W. Division

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 10, 1975)

Civil No. C 70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

VS.

JAMES A. RHODES, *et al.*,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs have filed a motion seeking access to a transcript of the testimony of all witnesses appearing before the federal Grand Jury which returned the indictments in the case of *United States v. Shafer, et al.*, CR 74-165, N.D. Ohio, E. Division, or in the alternative, the testimony before said Grand Jury of certain named parties defendant in the instant cases.

The motion is opposed, and from the memoranda filed with the Court it appears that the defendants have in their possession transcripts of testimony of some of the parties plaintiff herein before the same Grand Jury. How the defendants secured this material is not made clear.

The motion presents some conflict between the Court's discovery orders which tried to make clear that no relevant

evidence should be withheld from discovery, and the Court's very strong feeling that the traditional secrecy of grand jury proceedings ought to be maintained to the fullest possible extent.

It would be possible to avoid dealing with this conflict by pointing out that the material sought here is not the sort of contemporary, "original source," materials with which the Court was concerned in its discovery orders, or by ruling that with trial scheduled to commence in three days, the discovery is not timely.

However, it is clear that, whether properly or improperly, the secrecy of the Grand Jury in question has been broken, and that one side has had thereby an advantage that the other side has not.

A court ought not to insist on consistency in the application of general rules, however important these may seem to the court, at the cost of even an appearance of unfairness in the case which is before it. Rulings made by a trial court in a particular case have little value as precedents, and thus a deviance from the general rules by such a court will not damage the structure of the law.

With considerable unhappiness, the Court will grant the plaintiffs' motion in its alternative form, to give them access to the grand jury testimony of the parties defendant named in the motion. In so doing, the Court is not creating a precedent to which it will give weight in future cases, but is merely deciding a particular problem arising from peculiar circumstances in a unique case. It would not be wise for anyone ever to cite this ruling to this Court in any future case.

Therefore, for all the reasons stated herein, it is

ORDERED that the motion of plaintiffs filed in the alternative for the testimony before the federal grand jury

which returned the indictments in the case of *United States v. Shafer, et al.*, of certain named parties defendant should be and hereby is granted, and it is

FURTHER ORDERED that plaintiffs are granted access to the federal Grand Jury testimony of the following defendants:

James A. Rhodes
Sylvester Del Corso
Robert H. Canterbury
Robert White
Howard R. Fallon
Charles E. Fassinger
Harry D. Jones
Dwight G. Cline
John E. Martin
Myron C. Pryor
James R. Snyder
Raymond J. Srp
Alexander D. Stevenson
Rodney R. Biddle
Dennis L. Breckenridge
James K. Brown
William J. Case
James W. Farriss
Okey R. Flesher
Robert D. Hatfield
William F. Herschler
Lonnie D. Hinton
Robert D. James
Richard K. Love
Roger A. Maas
James D. McGee
Matthew J. McManus
Barry W. Morris
Larry R. Mowrer
Ronnie B. Myers
William E. Perkins
James E. Pierce
Phillip D. Raber
Russell E. Repp, Jr.
Richard R. Shade
Lawrence A. Shafer
Joseph D. Sholl
Leon H. Smith
Richard B. Snyder
Lloyd W. Thomas
Ralph W. Zoller
Rudy E. Morris
Paul R. Naujoks
Paul R. Zimmerman

and it is

FURTHER ORDERED that the United States Attorney shall provide plaintiffs access to the testimony before said grand jury of the above-named defendants.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge
N.D. Ohio, W. Division

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed September 15, 1976)

No. C70-544

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR KRAUSE, *et al.*,
Plaintiffs,

vs.

JAMES A. RHODES, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This cause comes to be heard upon the motions of plaintiffs to require the Clerk to correct the record by inclusion of the Trial Court's proposed charge to the jury and plaintiffs' proposed revisions to the proposed charge; to correct the record with respect to the deposition of Dr. Norman Rich; and to vacate the Court's protective

order of August 20, 1975, filed in written form on June 24, 1976.

The motion to correct the record by including the Court's proposed charge to the jury together with plaintiffs' proposed revisions is moot. These documents were filed by the Clerk on August 23, 1976, pursuant to the Order of the Court of Appeals.

The motion to correct the record by docketing Exhibit "D" to reflect its admission into evidence is unopposed and will be granted. Exhibit D is defendants' transcript of the edited videotape of the deposition of Dr. Norman Rich. Exhibit D and the edited videotape itself will be forwarded to the Court of Appeals.

The motion to vacate the Court's protective order of August 20, 1976, will be denied.

Therefore, for the reasons stated herein, good cause appearing, it is

ORDERED that the motion to include in the record the Court's proposed charge to the jury and plaintiffs' proposed revisions should be, and hereby is, denied as moot, and it is

FURTHER ORDERED that the motion to correct the record with respect to the deposition of Dr. Norman Rich should be, and hereby is, granted, and it is

FURTHER ORDERED that the Clerk shall file Exhibit D and the edited videotape of Dr. Norman Rich, and shall transmit them to the Court of Appeals as part of the record, and it is

FURTHER ORDERED that the motion to vacate the Court's protective order of August 20, 1975, [sic] should be, and hereby is, denied.

/s/ DON J. YOUNG
United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 28, 1979)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, Deceased,	)	C70–544
	)	C71–470
VS.	)	
JAMES A. RHODES, *et al.*	)	
SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, Deceased,	)	C70–859
	)	C72–439
VS.	)	
JAMES A. RHODES, *et al.*	)	
ELAINE MILLER HOLSTEIN, Administratrix of the Estate of JEFFREY GLENN MILLER, Deceased,	)	C70–816
VS.	)	
JAMES A. RHODES, *et al.*	)	

LOUIS A. SCHROEDER, Administrator of the Estate of WILLIAM K. SCHROEDER, Deceased,	)	C71-20
VS.	)	
JAMES A. RHODES, *et al.*	)	
DEAN KAHLER, ELAINE KAHLER, JOSEPH JOHN LEWIS and ELIZABETH LEWIS,	)	C71–471
VS.	)	
JAMES A. RHODES, *et al.*	)	
JOHN R. CLEARY and ROBERT CLEARY,	)	C71–21
VS.	)	
JAMES A. RHODES, *et al.*	)	
DONALD SCOTT MACKENZIE,	)	C71–22
VS.	)	
JAMES A. RHODES, *et al.*	)	
DOUGLAS WRENTMORE,	)	C71-23
VS.	)	
JAMES A. RHODES, *et al.*	)	

JAMES D. RUSSELL,	)	C71–25
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
THOMAS M. GRACE and THOMAS V. GRACE,	)	C71–24
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
ALAN M. CANFORA,	)	C71–26
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
ROBERT F. STAMPS and FLOYD STAMPS,	)	C73–643
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	

MEMORANDUM AND ORDER

The 13 Kent State civil damages cases are winding down. A Settlement and Dismissal Order was entered by this court on January 4, 1979 listing the terms of the settlement. When those terms are met, final entry in each of the 13 cases, with certain jurisdiction reserved, will be filed.

One of the reserved matters, the subject of several post-settlement hearings, is the motion of plaintiffs to

amend and vacate a protective order entered by the Honorable Donald J. Young.[1] The motion was made on June 27, 1978 and peremptorily denied by this court on October 13, 1978 because of the imminence of the second trial. The motion to vacate the order was renewed on January 8, 1979. The protective order of June 24, 1976 directs in part:

> ORDERED that all testimony given, and all materials of every kind and description produced, on discovery in these cases, are, and remain, the sole property of the person testifying, or producing such materials. Except as the same may be offered in any future proceeding in these cases, no use for any other purpose whatsoever shall be made of any of such testimony or materials that has not been made a part of the record of the trial of these causes without the express written permission of the person testifying or producing such materials;
>
> and it is
>
> FURTHER ORDERED that none of the parties hereto, or their counsel, who have possession of any transcripts of such testimony, or of any of such materials, shall permit the same to be copied or used by any person whatsoever without the express written permission of the person testifying or producing such material, except for the purpose of offering or using the same in any future proceedings in these causes.[2]

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1. In September, 1979, Judge Young recused himself from the second trial ordered by the Court of Appeals in *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977). This judge was thereafter appointed to conduct the second trial.

2. This order was appealed to the Sixth Circuit Court of Appeals. On motion of plaintiffs-appellants and appellant Peter Davies, the Court of Appeals remanded the matters that make up the appeals in the Court of Appeals, Case Nos. 77-3317 and 3172. This remand returns the jurisdiction over Judge Young's order to this court.

It is concluded that the protective order of June 24, 1976 should not be extended beyond the termination of this litigation. A large quantity of discovery materials obtained by each party now fills storage rooms of counsel for the parties. The existing protective order leaves the future use of these materials to the "person testifying or producing such material," who must first give "express written permission." Giving veto power over use of the material to the witness or the producer of the material impermissibly assumes a property interest in the testimony or discovered material.[3] It is this court's considered judgment that the "person testifying or producing such materials" has no property interest in any of the materials. Hence, such person is not entitled to ban the use of the material by withholding permission. Thus assessed, enforcement of this order should be terminated. It shall end contemporaneously with orders making appropriate disposition of the discovery materials.

Plaintiffs ask that this court vacate the protective order and permit each of the parties to make such dis-

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3. *Blair v. United States*, 250 U.S. 273, 281 (1919), thus defines the public duty of every citizen to testify in a court proceeding:

> . . . [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

A person compelled to testify as a public duty possesses no private property interest in the testimony he gives, and the testimony becomes part of the public domain. *See United States v. Mitchell*, 386 F.Supp. 639, 642 (D.D.C. 1975). (Decided by Supreme Court *sub nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).)

As to discovered materials not yet part of the public domain, a right of privacy but not a property interest, exists for those persons whose names appear in statements.

position of the accumulated discovery materials as each party determines to be suitable, given the "historic" nature of the public event chronicled in these materials. Plaintiffs indicate that they are negotiating with Yale University Library to turn over the materials in the files of counsel for plaintiffs. Counsel for plaintiffs state that they also have considered the possibility of turning over at least some of these materials to the Ohio Historical Society.

Defendant Guardsmen, Governor Rhodes, and the Attorney General of Ohio request return of the materials obtained from the Ohio National Guard, Ohio Highway Patrol, and the Ohio Bureau of Criminal Identification and Investigation (BCI). The United States Attorney, whom the court has permitted to intervene in the proceedings, asks that this court order the return of not only the Federal Grand Jury testimony but also FBI interview reports secured by subpoena from the United States Attorney and the Department of Justice.

The prosecutor of Portage County, whom the court has permitted to intervene in these proceedings, requests that the testimony of witnesses who appeared before the Portage County (Ohio) Special Grand Jury[4] and related grand

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4. As detailed in *Hammond v. Brown*, 323 F.Supp. 326 (N.D. Ohio), aff'd 450 F.2d 480 (6th Cir. 1971), a special grand jury was impaneled by the Portage County Common Pleas Court on September 14, 1970 in connection with the events of May 1-4, 1970 in the city of Kent, Ohio and on the campus of Kent State University. After taking the testimony of at least 200 witnesses, the special grand jury returned 30 indictments against 25 persons on October 15, 1970. These indictments included 43 state criminal offenses.

In *Hammond*, this court denied the request of plaintiffs to grant a permanent injunction against the prosecution of the indictments. Further concluding that the "report of the special grand jury was issued illegally and wholly without lawful authority," and that "the report irreparably injures . . . the rights of the indicted plaintiffs," this court ordered Lucy S. DeLeone, Clerk of Courts of Portage County, to obliterate or physically remove and destroy the "Report of the Special Grand Jury."

jury materials be returned to the Clerk of Courts of Portage County from whom these materials were obtained by *subpoena duces tecum*. Kent State University through its counsel asks for return of police radio logs, witness statements and photographs subpoenaed from the Kent State University Police Department.

Deposition witnesses *Ambler, et al.* (five in all), through Kent State University counsel, who also represent them individually, on April 24, 1975 were "granted leave to file a motion concerning restrictions on the use of depositions." Their ensuing motion with reference to the depositions led to Judge Young's oral protective order of August 20, 1975 and the journalized protective order of June 24, 1976. The Ambler deponents, here treated as intervenors, oppose the vacation or modification of these orders.

Counsel for Kent State University and the Ambler deponents question the standing of plaintiffs to move for a vacation of Judge Young's protective order.[5] The original parties to these cases as well as the intervening parties are each found to face sufficient possible injury in fact that might result from this court's disposition of the discovery materials adverse to a possible interest of each party to provide each of these parties standing in a constitutional sense. *See Worth v. Selden*, 422 U.S. 490, 498-502 (1975).

The several motions and requests are considered upon a record consisting in part of testimony of Steven Keller, paralegal aide for plaintiffs' counsel, who has been the principal custodian of discovery materials in the possession

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5. Plaintiffs through their counsel Sanford J. Rosen, assert they have adequate standing both because they are affected by Judge Young's order and because of First Amendment interests in using the discovery materials. Plaintiffs' counsel also represents a Peter Davies, a historian, and author who seeks to use the materials. He previously moved to vacate Judge Young's order, and thereafter, appealed the denial of his motion.

of the plaintiffs. This court, at its request, personally inspected the materials obtained by plaintiffs from the State of Ohio agencies, including the copies plaintiffs placed in the Kent State University Library Archives. Briefs of counsel and oral arguments have also been considered.

I.

A.

Plaintiffs raise first a timeliness objection to the requests for return of discovery materials other than the federal grand jury testimony.

Plaintiffs note that Judge Young issued no order that materials obtained from a government agency should be returned to that agency upon the conclusion of the litigation. Plaintiffs argue that it is now too late for this court to issue such an order; and in any event, this court could only do so by issuing a protective order "for good cause shown" pursuant to Rule 26(C) of the Federal Rules of Civil Procedure.

Plaintiffs, who obtained these discovery materials only because of Judge Young's "open file" discovery policy[6] will not now be heard to fault the lack of accompanying orders by Judge Young to return the materials after the discovery

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6. Defendants did try to obtain a protective order as to the Ohio National Guard and Ohio Highway discovery materials; and they also sought to quash service on the subpoena for the Portage County Grand Jury documents and testimony minutes. But Judge Young, adhering consistently to his "open file" discovery policy, declared in his memorandum and order of February 20, 1975:

> At the outset, it ought to be understood that this court is a firm adherent to the concept of "open file" discovery. . . .
>
> So far as this court is concerned, no matter who gathered and recorded information close to the time of the tragic events involved in this litigation, and no matter what their reason or purpose for gathering it, it must be fully disclosed to all parties to this litigation. . . .

purpose was satisfied. In announcing his adherence "to the concept of 'open file' discovery," Judge Young gave plaintiffs no reason to infer or even to suspect that the parties were thereby given carte blanche to disseminate the discovered materials to the public domain. The truth of the matter is that the question of how the discovery materials should be handled at the close of the cases was not raised by the parties nor mentioned by the court.[7]

Actually, a contrary intent is disclosed by the court's later orders. On April 24, 1975, within two months of his "open file" discovery pronouncement, Judge Young granted KSU counsel leave "to file a motion concerning restrictions on the use of depositions." Subsequently, Kent State University counsel made such a motion, which led to a hearing and Judge Young's oral order on August 20, 1975 that "anybody who wanted to use any of the discovery material had to get the permission of the person who was being discovered before he used it." This oral order was more formally journalized on June 24, 1976 in the words earlier quoted. Thus, the record does not support the apparent claim that somehow defendants waived their right to protective orders now by not seeking orders earlier.

B.

Abjuring the untimeliness argument, we turn to the contention that the several requests for the return of discovery materials in effect ask for protective orders for which Fed.R.Civ.P.'s 26(c) requirement of "good cause" has not been met. In addition, because of the First Amend-

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7. Moreover, plaintiffs may not use as a handhold to advance their untimeliness argument the dissemination of materials due to the number and scattered locales of attorneys who have assisted plaintiffs.

ment free expression claims that plaintiffs assert in the future use of the discovery materials, plaintiffs say that each of the requesting parties must establish constitutionally mandated "good cause" before this court may order return of the requested materials.

In support, plaintiffs cite *In re: Adele Halkin,* No. 77-1313 (D.C. Cir., filed Jan. 19, 1979), decided by the D.C. Circuit Court of Appeals on January 19, 1979. In that case, documents were obtained by plaintiffs from the CIA and National Security Council by means of Fed.R.Civ.P. 34.[8] The Court concluded that "First Amendment rights attach to materials made available through the discovery process." *In re: Adele Halkin,* slip op. at 27. In so concluding, the court both distinguished and took issue with Judge Friendly's opinion in *International Products Corp. v. Koons,* 325 F.2d 403, 407-08

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8. Halkin and other plaintiffs are principally suing the Central Intelligence Agency and the National Security Agency alleging that these organizations conducted unlawful programs of surveillance of United States citizens who opposed the war in Viet Nam or engaged in other lawful political activities. In response to a motion for production of documents, defendants made available to plaintiffs some 3,000 pages of documents relating to Operation Chaos, the code name for the CIA's surveillance of anti-war activists. Believing that some of these documents contained important information not previously known concerning the operation of Chaos, plaintiffs gave written notice of their intention to release certain documents. Defendants sought and obtained in the district court a protective order against public disclosure. They argued that such disclosure would be "prejudicial to the defendants' right to adjudication of the issues in this civil action in an uncolored and unbiased climate, including a fair trial." Plaintiffs sought a writ of mandamus to prohibit or vacate the trial court's protective order. The appellate court, in a two-to-one decision, did not issue a writ; but it transmitted a copy of its opinion to the district court "to permit further proceedings in the light of the discussion in the opinion." Thus, the district court was told that the protective order should be vacated. Defendants were told that they were free to seek a new restraint on "promulgation of documents by plaintiffs" if a narrowly drawn order "would be constitutional under the principles outlined in this opinion."

(2nd Cir. 1963).[9] The court explicated what it called "the appropriate constitutional standard governing the issuance of restraining orders under Rule 26(c):" It "must take account of the important public interests in the functioning of the discovery process . . . as well as the First Amendment interest in unfettered expression." *In re*: *Adele Halkin*, slip op. at 27.

The *Halkin* majority directed the district court to initially determine "whether a particular protective order in fact restrains expression and the nature of that restraint. An order restraining publication of official court records open to the public, or an order restraining political speech implicates different interests than an order restraining commercial information." Slip op. at 27-8 (footnotes omitted). In n. 29, pertinent here, the court stated that "[a]rguably there is an absolute privilege to disseminate information contained in public court records. *See Okla-*

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9. That holding was as follows:

> The portion of the order which seals the deposition of Seldes and limits defendants and others in their use of information obtained therefrom was plainly authorized by Fed.R.Civ.P. [26(c)] and we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes.

After flatly opining that "this passage does not say that parties have no First Amendment rights in discovery materials, Judge Bazelon then declared:

> If *Koons* does stand for the proposition that the parties in a civil action waive all First Amendment rights in discovery materials, as the *Rodgers* [*v. United States Steel Corp.*, 536 F.2d at 1006] court suggested in dicta, then we think it is wrong. Waivers of First Amendment rights are to be inferred only in "clear and compelling" circumstances. [Citations omitted.]

Slip op. at 24. Both *Koons* and *Halkin* concern the validity of pretrial orders to protect the trial process while the present post-trial situation involves the proper disposition of materials in the actual or constructive custody of the court. Hence, neither *Koons* nor *Halkin* is direct authority, and the court need not adopt one or the other decision as here dispositive.

homa Publishing Co. [*v. District Court*, 430 U.S. 308, 310-11 (1977)]; *Nebraska Press Ass'n*, [*v. Stuart*, 427 U.S. 539, 568 (1976)]." However, it then noted that the existence of the privilege depends on the nature of the discovery material:

> Plaintiffs here, however, cannot claim that privilege. The documents were disclosed pursuant to Rule 34 Fed.R.Civ.P. This rule, unlike other methods of discovering information under the Federal Rules, including depositions (Rule 30), interrogatories (Rule 33), and requests for admission under Rule 36, does not provide that responsive material be filed with the court and made part of the public record.

The court further noted that the first amendment interests vary according to "the timeliness of the expression," and that "highly newsworthy information" presents "a different issue than a temporary restraint of materials having 'constant but rarely topical interest.'" Slip op. at 28-9.

The court then set up three criteria by which a trial court must evaluate any protective order impinging on first amendment interests:

> The harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression.

Slip op. at 29.

A literal reading of Rule 26(c) suggests that a trial court's power is limited to prescribing conditions under which the district court might permit discovery in the first instance. But both the *Halkin* court, interpreting Rule 26(c), and the *Koons* court, interpreting Fed.R.Civ.P.

30(b) (predecessor of 26(c)), construe the rule to authorize orders to protect the trial process from "harmful" use of the discovery materials after the completion of the discovery process.

In accord with these cases, this court construes Rule 26(c) to give a district court authority to issue a protective order controlling the disposition of discovery materials after a party has acquired the materials, as well as fixing and controlling the conditions under which discovery may be obtained in the first instance.

Plaintiffs stress the burden to show "good cause" cast by Rule 26(c) on the movant. However, if a party seeking a protective order fails to show "good cause" essential to issuance of a protective order, "including one or more" of eight enumerated orders, the matter does not end there. The last paragraph of Rule 26(c) provides:

> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Just as the first paragraph may be applied to materials already discovered, the last paragraph also is broadly construed to authorize a court to make orders that apply to materials already discovered. Since an order that the court may issue under the last paragraph of Rule 26(c) is not dependent on a showing of good cause, it may not grant any of the eight items of relief listed in the first paragraph. However, such an order may allow for use of the discovered materials "on such terms and conditions as are just."

The grant of any request for return of a block of discovered materials will have the effect of denying the opportunity to plaintiffs to release to the public that par-

ticular block of materials. Therefore, each return request is treated as an application for a protective order banning publication of such materials. Good cause therefore must be shown before such return is ordered. Yet, even if good cause for a complete return of any discovered materials is not shown, the denial of the motion for a full return may be accompanied by an order that would permit use of a particular block of materials "on such terms and conditions as are just.[10] However, in this matter the factors considered in determining whether there is good cause to order a return of the particular block of discovery materials are the same as the factors considered in determining whether any relief short of return should be ordered. These factors will now be identified.

Halkin holds that the "appropriate constitutional standard governing the issuance of restraining orders under Rule 26(c) must take account of the important public interests in the functioning of the discovery process . . . as well as the First Amendment interest in unfettered expression." Slip op. at 27. While this standard makes

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10. Other than some 83 depositions on file with the court, the discovery materials at issue are in the physical custody of the parties. While these materials thus are not and have not been part of the "official court records open to the public," they are regarded as at all times having been within the constructive custody of the court. They were obtained by the parties through discovery granted under the court's "open file" discovery policy and are deemed subject to the court's orders. The court has inherent power over its own process to "prevent abuses, oppression, and injustices." *Gumbel v. Pitki*, 124 U.S. 131 (1888); *International Products Corporation v. Koons*, 325 F.2d 403, 407-08 (2nd Cir. 1963); *Parker v. Columbia Broadcasting System*, 320 F.2d 937, 938 (2nd Cir. 1963).

Although they are in the constructive custody of the court these discovery materials would only be part of the "official court records open to the public" to the extent they have entered the public domain. Only the latter materials would be subject to the common-law right to inspect and copy, a general right recognized in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978).

no mention of the right of privacy, it is significant that the court recognized this factor. For it noted that in a filed response to the request for production of documents, defendants indicated:

> . . . that the produced documents had been purged of all matter which the government asserted would . . . (3) implicate the privacy interest of third parties.

Slip op. at 3. Therefore, in this matter the constitutional standard must be construed to embrace the right of privacy of third parties. In addition, the federal and state public policy protecting the secrecy of grand jury proceedings must be respected and enforced.

Finally, the two prongs of the *Halkin* "constitutional standard" must be applied to the facts of this case. Judge Young's "open file" discovery policy, admirable as it may have been in the preparatory stage of these cases, does not permit this court to shirk its responsibility to preserve "the public interests in the functioning of the discovery process," now that the cases are winding down. The policy of "open file" discovery was not intended to serve as a vehicle to enlarge the public domain, laudable though that goal is. To permit the discovery process to serve that extraneous purpose would not encourage its acceptance or improve the "functioning of the discovery process." Thus synthesizing the discovery process, the first amendment interests, and other pertinent constitutional and public policy principles, each unit of discovery materials will be separately considered in light of these factors.

II.

A.

Judge Donald J. Young on May 28, 1975 granted a motion of the United States for a protective order con-

cerning the testimony of certain defendants given to the federal grand jury that returned the indictments in the case of *United States v. Schafer, et al.*, CR74-165 (N.D. Ohio.) He entered the order after he learned that defendants had in their possession transcripts of testimony that some of the parties plaintiff in these cases had given before the same grand jury. The order granted plaintiffs "access to the Grand Jury testimony of the parties defendant named in the motion." Counsel for all parties in these cases indicate that they have complied with each of the conditions of the protective order at all stages of the litigation. The last condition of Judge Young's protective order of May 28, 1975 ordered:

> . . . that all copies of this testimony be returned to the United States Attorney at Cleveland, Ohio at the conclusion of this litigation.

The United States Attorney now requests that this order be carried out, the litigation being concluded. Plaintiffs do not oppose this request.

Any first amendment interest in releasing the federal grand jury testimony to the public domain is overridden by the public policy of maintaining the continuing secrecy of grand jury proceedings. To open the testimony to public view and public quotation would be likely to make people believe that the established grand jury secrecy policy has been abandoned or is a sham and a pretense. Harm to the grand jury system would result.

There is no indication of a present intent to destroy the grand jury testimony. However, before the United States Attorney or the Department of Justice proceeds to destroy such material, they are directed to give 30-day notice of intention-to-destroy to this court and to the parties or their counsel.

B.

The prosecutor of Portage County requests that this court order counsel to return to the Portage County Clerk of Courts all materials obtained from the Clerk of the Common Pleas Court of Portage County, Ohio. Concerning the *subpoena duces tecum* served upon Clerk of Courts DeLeone, Judge Young stated (in his February 20, 1975 ruling):

> The problem of the Grand Jury materials is somewhat different, because this court considers the matter of the secrecy of Grand Jury proceedings a most important one . . . In this case, to begin with, the only thing sought is the documentary evidence which was laid before the Grand Jury.

However, as the wording of the *subpoena duces tecum* recorded n. 11 indicates, "documentary evidence" was not "the only thing sought." "[W]itness testimony" was also subpoenaed. While Judge Young's order does not mention this part of the subpoena[11] in fact, the testimony of approximately 200 witnesses was subsequently surrendered to the parties by the clerk of court after Judge Young overruled the motion to quash service of the subpoena. Since it is not directed to the grand jury testimony, Judge Young's ruling cannot stand as authority for the proposition that secrecy imposed on "matters

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11. Actually, the subpoena requested:

. . . the results of the investigation and the report of and all documents and materials related to and attached thereto by the *Portage County Ohio Grand Jury* pertaining to the events at Kent State University on, about and around May 1-5, 1970. This material to include minutes and witness testimony relating to events at Kent State University May 1-5, 1970.

occurring before the Grand Jury"[12] was waived or modified with reference to the testimony of witnesses appearing before the grand jury.

Judge Young next stated:

> The Grand Jury made a report which badly damaged, if it did not destroy, the secrecy of those of its proceedings which relate to the instant case. When the reason for a rule ceases to exist, so does the rule itself.

In *Hammond v. Brown*, n.3, *supra*, this court determined:

> The Report is issued unlawfully in violation of the Grand Jury's oath of secrecy since its findings and conclusion in Parts I through VII itemize and comment upon the evidence heard and received by the special Grand Jury. The vice of the violation of the oath of secrecy is that the special Grand Jury finds commission of criminal offenses and ascribes guilt to participants in the described incidents.

Nevertheless, the Report did not disclose the identity of the witnesses who appeared before the special grand jury. Nor was any testimony of any witness quoted in the Report. It would improperly compound the vice of the Report—expunged by this court from the records of Portage County Common Pleas Court—to conclude that the issuance of the Report destroyed the secrecy of the testimony before the special grand jury.

With reference to the identities of the approximately 300 witnesses who appeared before the special grand jury

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12. Ohio R. Crim. P. 6(E) provides in part:

A Grand Juror . . . may disclose matters occurring before the Grand Jury, other than the deliberations of the Grand Jury or the vote of the Grand Juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding. . . .

and to the transcribed testimony of approximately 200 witnesses, the state-imposed secrecy of those "matters occurring before the Grand Jury" has not been compromised or destroyed. Therefore, for the same reasons stated in part II.A. at p. 18, the continuing duty to protect the secrecy of grand jury proceedings overrides any first amendment interests in "unfettered expression" and meets the burden of good cause. The parties are ordered to return all copies of the Portage County Special Grand Jury testimony to the Clerk of Courts of the Portage County Common Pleas Court.

The documentary materials produced by the clerk of courts, comprising 15 folders, have been examined at side bar in the presence of counsel for the parties and an assistant Portage County Prosecutor.[13] Substantially all these documentary materials were found by the court to have already entered the public domain. Specific rulings allowing release of these materials were put on the record. However, names of witnesses and the scheduling of witnesses' appearances before the grand jury and certain related materials, obviously part of the grand jury's investigative process, were found to be subject to continuing grand jury secrecy. Counsel for all parties are also ordered to return the designated documentary materials to the Clerk of Courts of Portage County along with the grand jury witness testimony.

The Prosecutor of Portage County has reported that if returned, the grand jury materials will be sealed in metal cabinets and preserved by the clerk pursuant to O.R.C. §2309.09. Should the clerk hereafter alter this

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13. At a hearing on February 6, 1979, plaintiffs brought from their Columbus repository of discovery materials the documentary materials produced by the Portage County Clerk of Courts and the discovery materials obtained by subpoena from the Ohio National Guard, the Ohio Highway Patrol, and the Ohio Bureau of Criminal Identification and Investigation (BCI).

announced decision, the clerk is directed to serve a thirty-day notice of intention-to-destroy any or all the materials upon this court, plaintiffs and defendants or their counsel.

C.

Frederick C. Coleman, United States Attorney, pursuant to a subpoena served on him on February 21, 1975, produced 523 FBI "302" interview reports some of which are signed statements. These reports were obtained during the FBI investigation of the Kent State incident. Counsel for plaintiffs and counsel for defendants each have a full set of these FBI interview reports.

Before the start of the second trial on December 4, 1978, plaintiffs obtained 235 additional FBI interview reports through deposition subpoena and notices served on the Chief, Criminal Section, Civil Rights Division, United States Department of Justice. By agreement, the interview reports were forwarded in early November, 1978 to plaintiffs' counsel in Cleveland, and copies were made available to defendants' counsel.

Subsequently, through FOIA requests, many of the same FBI interview reports were obtained by plaintiffs. However, the court is advised that the names of witnesses, FBI agents and third-parties in the interview reports were deleted in accordance with 5 U.S.C. §552(b).[14]

James R. Williams, the present United States Attorney, has asked for a return to the government of all these materials. Plaintiffs vigorously oppose this request. They argue that the first amendment entitles them to unrestricted dissemination of these FBI interview reports and the other witness statements that are at issue. Plaintiffs

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14. 5 U.S.C. §552(b) reads in part:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

contend that the United States Attorney, who for the first time on January 15, 1979 made his request, has the burden of showing good cause for a protective order.

The request of the United States Attorney for a return of the FBI materials is treated as a request for a protective order. While this court determines that the burden of showing good cause to grant either return or sealing has not been met, it is determined that an order on "terms and conditions as are just" shall be entered. Deletion of names of "third parties" (witnesses, FBI agents, and other names appearing in the interview reports) prior to dissemination of the FBI materials will avoid violation of or injury to the privacy rights of unwitting and unrepresented third parties. Thus redacted, the statements will be in precisely the same condition as the *Halkin* documents, *supra* at p. 16. As such, release to the public domain of the redacted statements will satisfy all appropriate first amendment interests in "unfettered expression."

At the oral hearing, counsel for plaintiffs asked rhetorically who would bear the expense of "reconstructing" the materials. The costs of returning the grand jury testimony and the Ohio National Guard "201's," discussed *infra*, shall be borne and paid for by the parties who have the materials. But redaction is deemed best handled by the original custodians of the interview report or witness statements. Therefore, such government custodians are directed to bear the cost of deleting all third-party names from each witness statement or interview report.[15]

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15. At the February 6 hearing the court ordered plaintiff to bear any cost of redaction. On further reflection, it is believed this would impose a burden, impermissible under the first amendment, on the release of the redacted materials into the public domain. Thus, it is concluded that the particular agency that is directed to proceed with redaction should bear the cost of redaction, and the court's earlier oral ruling is vacated.

To implement this ruling, plaintiffs are directed to turn over to the United States Attorney all the FBI "302's" so that the names of all third parties may be deleted. The redacted statements and interview reports shall then be returned to plaintiffs for release to the public domain. If defendants decide to release their copies of the interview reports, they must likewise turn their copies over to the United States Attorney for redaction. If they decide to destroy their copies, an appropriate affidavit of destruction shall be filed by the Attorney General of Ohio.

D.

The Ohio National Guard and Ohio Highway Patrol discovery materials have been examined by the court with counsel for plaintiffs and defendants present. Among the Ohio National Guard discovery materials are the "201's" (personnel files) of the defendant Guardsmen. Each Guardsman has a right of privacy in these records. Moreover, these are ongoing files of the Ohio National Guard. A privilege attaches to these materials that is not relaxed or modified by the production of these files under subpoena. All "201's" in the possession or custody of counsel for the parties are ordered returned to the Ohio National Guard.[16]

During the hearings on the present motions, Steven R. Keller, paralegal aide for the American Civil Liberties Union who has acted as custodian of all of the discovery materials for plaintiffs, testified that in 1975 copies of all the Ohio Highway Patrol discovery materials and copies of all the Ohio National Guard discovery materials (except the "201's") were turned over to the Kent State

16. Plaintiffs do not oppose the motion to return these materials. In any event, defendants have met the burden of establishing good cause for the return request.

University (KSU) library. At the hearing of February 6, 1979, this court authorized plaintiffs to release statements of witnesses on the assumption that these particular discovery materials since 1975 have been a part of the public domain. The information obtained by this court by personal inspection of the KSU archives reveals that these materials have not been released for public viewing.[17] Because the court's assumption that these materials have been in the public domain is incorrect, the bench rulings based on this assumption are vacated.

While the request for return of the witness statements and interview reports is denied, redaction of names of third parties in these statements and reports is ordered to protect the privacy rights of third parties. This order is

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17. This court on March 9, 1979 viewed the Ohio National Guard and Ohio Highway Patrol materials in Kent State University Library Archives. Lying on top of several folders in a single box in the locked Special Collections room is a March 7, 1975 affidavit of Les Stegh, then KSU library archivist. Les Stegh attests that he reproduced the materials (presumably in Columbus), which then became the property of the library archives. Of the four conditions of the acceptance, the following are presently pertinent:

> 2. That said materials will not be made public, except through Court Order, by myself, the Kent State University Library, or any of its staff, until such time after the Kent civil cases as approved by the General Counsel of the ACLU of Ohio, Inc. . . .
>
> 3. The purpose of this agreement is to prevent prejudicial publicity. The primary purpose of my obtaining these documents is to make them available for historical and research purposes once prejudicial publicity is no longer an issue. . . .

It is evident that the documents were not intended to be made public at the time the documents were given to archivist Stegh, and that the conditions under which the documents could be made public have not yet come to pass. Nor have the materials been released to the public in violation of these conditions. Dean Keller, in charge of the locked Special Collections room since before March, 1975, informed the court there has been no access to these documents and no request for the documents.

entered on the same ground and similar terms as the similar order in Part II.C of this opinion.

This court's examination of the Ohio Highway Patrol and Ohio National Guard materials did not reveal any likelihood of an ongoing police investigation in any of the materials. Moreover, the court did not find any recording of law enforcement policies, procedures or plans. Nothing of a sensitive law enforcement nature would be compromised by disclosure of these materials.

Therefore, except for the Ohio National Guard "201's" (personnel files), which are ordered returned as indicated, and setting apart the witness statements (Ohio National Guard and Ohio Highway Patrol) for redaction by the Ohio Attorney General (upon delivery by plaintiffs), the remaining Ohio National Guard and Ohio Highway Patrol materials are released as plaintiffs request. Once redacted, the witness statements shall be returned to plaintiffs for release to the public domain.

E.

Plaintiffs obtained by subpoena a substantial quantity of materials (2,849 pages) from the Ohio Bureau of Criminal Identification and Investigation, including a number of witness statements. The request to return these statements to the BCI is denied; however, redaction by the Ohio Attorney General of these statements is ordered upon delivery of the statements by plaintiffs to the Attorney General or its counsel. Upon redaction, the statements shall be returned to plaintiffs for release to the public domain.

Examination of the remaining materials turned over by the BCI does not reveal any likelihood of an ongoing police investigation. Moreover, no recording of any law

enforcement policies, procedures, or plans appears in any of the materials. Release of these materials would not reveal any sensitive law enforcement materials or compromise law enforcement activities. Hence, all of the BCI materials, other than the witness statements, are released from the protective order, and the witness statements after redaction may be released by plaintiffs to the public domain.

F.

The Kent State University Police Department was subpoenaed with reference to period May 1-5, 1970 to produce its investigation report of events at the university, witness statements, all documents relating to Terry Norman, photograph tape recordings, and all other documents relating to the period. A motion for a protective order with respect to these material was filed on February 27, 1975, particularly challenging production of "investigation reports." The court overruled the motion on March 25, 1975.

Counsel for the Kent State University Police Department has disclosed to the court copies of all materials turned over to the plaintiffs pursuant to the subpoena. These have been examined. The February 25, 1975 affidavit of director of safety supporting the police department's motion for a protective order declared:

> . . . the disclosure of the information . . . would not be in the public interest and would adversely affect the ability to operate an efficient and effective Police Department.

With the passage of almost nine years, the officer duty reports ("Report of Investigation"), and the "Daily Patrol, Phone and Radio Log[s]" for May 1 through May 5, 1970

have ceased to relate to any ongoing police investigation, nor would disclosure of any of these materials compromise any police procedures, tactical orders, or law enforcement policies. The Police Department has not established good cause for return of these materials. All may be released to the public domain.[18]

Similarly, the department has not established good cause for return of affidavits filed with courts, other miscellaneous police department documents that were turned over tc the plaintiffs, and witness statements and interview reports, the statements of Terry Norman and other statements relating to the Terry Norman incident. The incident has been well publicized. Except, however, for the Norman incident, all witness statements, interview reports and advice of rights acknowledgements may only be released to the public after redaction of names of witnesses, names of interviewing officers, and any third party names. While the Department shall release a certain statement entitled "To Whom It May Concern" after deletion of the

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18. In opposing the release of the investigative reports, counsel for the University Police Department cites *Wooster Republican Printing Co. v. City of Wooster*, 56 Ohio St. 2d 126 383 N.E. 2d 124 (1978), the fourth paragraph of the syllabus of which declares: "Police and other law enforcement records are not subject to compulsory disclosure provisions of R.C. 149.43." This Ohio Supreme Court decision dealt with a newspaper seeking disclosure of police records not already discovered in the course of a judicial proceeding. Thus, it is distinguishable from the present case in which disclosure by discovery was judicially ordered in April, 1975. But more importantly, the syllabus must be construed in light of the opinion which interprets O.R.C. §149.43 (disclosure of public records) in conjunction with O.R.C. §1347.08(f) (as amended, effective August 26, 1977), which reads:

> This section does not allow a person to have access to any information compiled in reasonable anticipation of a civil or criminal action or proceeding.

It is manifest that no "civil or criminal action or proceeding based on the investigative files or logs, or photographs is anticipated. Hence, *Wooster, supra*, does not foreclose the release of either the redacted radio logs or witness statements."

name of the person making the statement, the letter of her parents transmitting the daughter's statement—asked to be treated as "confidential"—shall not be released to the public.

The police department or its counsel is directed to perform the redaction upon delivery of the materials by plaintiffs or defendants. If defendants have copies of the witness statements or interview reports, they shall be either turned over for redaction or destroyed. In all respects, the procedure prescribed in Part II.C. of this opinion shall be followed in redacting these materials.

Remaining for ruling are some 363 photographs and newspaper clippings. Except for a certain photograph—which appears to be a possible lineup photo—the photographs relate to public scenes or investigatory photographs of damage to property. These photographs are deemed to be in the public domain, but the "line-up" photograph shall not be released. Of course, the newspaper clippings were in the public domain when made part of the police department files.

G.

The materials of each agency, federal and state contain some statements or interview reports involving witnesses who later testified at trial. Since their testimony has entered the public domain, the statements of these witnesses or interview reports covering the same subject matter are determined likewise to have entered the public domain and need not be redacted.

III.

The last block of discovery materials to be disposed of are depositions taken in the course of these cases. Local Civil Rule 6 provides: "Except as otherwise provided,

depositions upon receipt shall be opened by the Clerk." During the criminal trial of certain defendants in *United States v. Schafer, et al.*, CR74-165 (N.D. Ohio E.D.), the court sealed all depositions, but thereafter on November 14, 1974 "unsealed" them. The effect of Rule 6 and Judge Young's unsealing order (construed to apply to depositions then on file and to depositions subsequently filed) is to treat the depositions as part of this court's public judicial records and documents.[19] The common-law right to inspect and copy these records is not conditioned "upon a need for it is evidence in a lawsuit," *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), although the right of inspection and copying "is not absolute."

Deposition witnesses David A. Ambler, Chester A. Williams, Richard E. Dunn, Thomas F. Kelley, and Robert E. Matson, seek a protective order sealing these depositions from public disclosure. This request rests on the grounds of the earlier objections to the taking of the depositions made by their counsel at the deposition hearings and in their April 24, 1975 motion for leave to file a request for "restrictions on use of depositions."

This court previously concluded that a deposition witness does not have a property interest in his testimony that would justify an order sealing the deposition subject to the deponent's right to control the use of his testimony. Such a claimed right would further collide with the general public nature of a deposition.

However, should a deposition witness show that a particular portion of a deposition, if placed in the public domain, would be used "to gratify private spite or promote public scandal," *Nixon v. Warner Communications, Inc.*, 435 U.S. at 603, that portion of the deposition may be

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19. *Cf. In re Adele Halkin*, n. 29, referred to *supra*, at p. 13.

sealed. Applying this standard, this court's examination of several depositions in question has revealed only the following items that should be sealed: the letter that is attached to the Chester Williams deposition as Exhibit 11A; and the answer of deponent Dunn at lines 18-22, p. 8 of his deposition.

Otherwise, there is no basis for sealing any of the remaining parts of the depositions of these movant deponents. It is not a ground for a protective order as suggested by deponents' counsel, that the depositions contain hearsay answers or answers whose relevancy or competency might be suspect. The test of the propriety of a discovery deposition question or answer is not admissibility at trial, nor is admissibility at trial the test for entry of the depositions into the public domain.[20]

All photos produced by deposition or trial subpoena shall be deemed part of the public domain.[21] These rulings with respect to depositions shall be understood to apply to only those depositions that have been filed with the court or copies of those depositions that are in the custody of the parties.

As to the remaining depositions, the court directs that a notice shall be sent by the Clerk of Court to each deponent at the address listed in the deposition informing the deponent that within 60 days after date of the memorandum and order, any deponent who believes that any of his testimony, if released to the public would be "used

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20. Of course, any person who might seek to publicize deposition testimony acts without benefit of the privilege that attaches to publication of evidence received at a public trial which becomes part of the trial record.

21. For the purposes of this opinion, and not for the purposes of any issues as to the law of copyright.

to gratify, spite or promote public scandal," should notify the court.[22] The deposition will be examined to determine if it contains any such material which will then be deleted before the deposition is permitted to be further inspected or copied by the public.

THE FOREGOING ORDERS ARE SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

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22. This order shall apply to all depositions whether or not on file. Counsel for plaintiffs are directed to furnish the court with addresses of those witnesses listed on the "Index to Depositions," whose depositions are not on file. These witnesses are:

Barnett, Charles
Bedall, Gordon
Breckenridge, Dennis
Duvall, James
Feest, William
Flesher, Okey
Grace, Tom
Hunt, Robert
Kahler, Dean Richard
Krause, Arthur S.
Lobo, Richard
MacKenzie, Scott
Manley, Jr., Donald E.
John Bambeck
Paul Locher
Alexander Dale Stevenson
Snyder, James Ronald
Stamps, Robert
Stewart, Dana
Wrentmore, Doug

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 12, 1979)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ARTHUR KRAUSE, Administrator of the Estate of ALLISON KRAUSE, Deceased,	)	C70–544
	)	C71–470
VS.	)	
JAMES A. RHODES, *et al.*	)	
SARAH SCHEUER, Administratrix of the Estate of SANDRA LEE SCHEUER, Deceased,	)	C70–859
	)	C72–439
VS.	)	
JAMES A. RHODES, *et al.*	)	
ELAINE MILLER HOLSTEIN, Administratrix of the Estate of JEFFREY GLENN MILLER, Deceased,	)	C70–816
VS.	)	
JAMES A. RHODES, *et al.*	)	

LOUIS A. SCHROEDER, Administrator of the Estate of WILLIAM K. SCHROEDER, Deceased,	)	C71-20
VS.	)	
JAMES A. RHODES, *et al.*	)	
DEAN KAHLER, ELAINE KAHLER, JOSEPH JOHN LEWIS and ELIZABETH LEWIS,	)	C71–471
VS.	)	
JAMES A. RHODES, *et al.*	)	
JOHN R. CLEARY and ROBERT CLEARY,	)	C71–21
VS.	)	
JAMES A. RHODES, *et al.*	)	
DONALD SCOTT MACKENZIE,	)	C71–22
VS.	)	
JAMES A. RHODES, *et al.*	)	
DOUGLAS WRENTMORE,	)	C71–23
VS.	)	
JAMES A. RHODES, *et al.*	)	

JAMES D. RUSSELL,	)	C71–25
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
THOMAS M. GRACE and THOMAS V. GRACE,	)	C71–24
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
ALAN M. CANFORA,	)	C71–26
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	
ROBERT F. STAMPS and FLOYD STAMPS,	)	C73–643
	)	
VS.	)	
	)	
JAMES A. RHODES, *et al.*	)	

ORDER

The court having filed its memorandum and order concerning the protective orders in these cases; therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED THAT:

(1) The court's protective order of June 24, 1976 is vacated;

(2) All counsel in these cases shall return to the United States Attorney, Cleveland, Ohio, all copies of the testimony given before the federal grand jury that returned the indictments in the case of *United States v. Shafer, et al.*, CR74-165 (N.D. Ohio);

(3) Thirty (30) days prior to the destruction of the materials listed in paragraph (2), *supra*, the United States Attorney or the Department of Justice shall serve a notice of intention-to-destroy upon this court, plaintiffs and defendants or their counsel.

(4) All counsel in these cases shall return to the Clerk of Courts of Portage County, Ohio all copies of the testimony given before the Portage County Special Grand Jury that investigated the shootings at Kent State University on May 1-4, 1970, and all copies of designated documentary materials containing names and scheduling of grand jury witnesses and related matters pertaining to the investigative process of the grand jury.

(5) Thirty (30) days prior to the destruction of the materials listed in paragraph (4), *supra*, the Clerk of Courts of Portage County, Ohio shall serve a notice of intention-to destroy upon this court, plaintiffs and defendants or their counsel.

(6) Plaintiffs' counsel shall turn over for redaction (deletion of names of witnesses, interviewing officers, and third parties):

(a) To the United States Attorney, all copies of FBI "302" interview reports and witness statements.

(b) To the Ohio National Guard and the Ohio Highway Patrol, all copies of witness statements and witness interview reports obtained from those agencies;

(c) To the Ohio Bureau of Criminal Identification and Investigation (BCI), all copies of witness statements obtained from that agency;

(d) To the Kent State University Police Department (KSU PD), all copies of witness statements, interview reports and advice of rights acknowledgements (except those relating to the Norman incident) obtained from that agency, and all copies of a statement entitled "To Whom It May Concern."

After redaction, each individual or agency listed above shall return to plaintiffs' counsel the reports, statements and acknowledgements.

(7) Defendants shall either turn over for redaction the materials listed in paragraph (6)(a)-(d), *supra*, in which case the materials shall be returned to them after redaction, or destroy these materials and have filed by the Attorney General of Ohio appropriate affidavits of destruction.

(8) The foregoing redaction orders shall not be required with reference to statements of, interview reports of, or acknowledgements by witnesses who later testified at trial.

(9) All counsel shall return to the Ohio National Guard all copies of the "201" personnel files of the defendant Guardsmen.

(10) The remaining Ohio National Guard and Ohio Highway Patrol discovery materials are unconditionally released to counsel.

(11) All the remaining BCI discovery materials are unconditionally released to counsel.

(12) All counsel shall return to the KSU PD all copies of a letter transmitting the statement entitled "To Whom It May Concern."

(13) All the remaining KSU PD discovery materials are unconditionally released to counsel.

(14) All photographs —(except a "line-up" photograph, all copies of which are to be returned by all counsel to the KSU PD) and all newspaper clipping are unconditionally released to counsel.

(15) All copies of the letter attached to the Chester Williams deposition as Exhibit 11A and the answers of deponent Dunn at lines 18-22, p. 8 of his deposition shall be sealed.

(16) The Clerk of Courts, as directed by this court, shall send a notice to each deponent (including Ambler, Williams, Dunn, Kelley and Matson) informing him or her of the right to notify the court within 60 days of receiving the notice of any deposition testimony that would, if placed in the public domain, be used "to gratify private spite or promote public scandal." The memorandum and order of February 28 is amended to extend the within right of notice to Ambler, Williams, Dunn, Kelley and Matson as well as other deponents.

(17) The memorandum of February 28, 1979 shall be amended to reflect that plaintiffs have preserved objection to return of federal grand jury testimony.

(18) The memorandum of February 28, 1979 shall be amended to require defendants' counsel to provide Clerk of Courts with addresses of deponents who were defendants or former defendants.

(19) The following pleadings shall be sealed: Exhibit A, pp. 5-10 to Exhibit B, Exhibits B, C, D, E, F, G, H to

Exhibit B of plaintiffs' January 12, 1979 Motion to Include Affidavits (etc.); Exhibit A to plaintiffs' February 23, 1979 Motion to Include Affidavits (etc.).

(20) All foregoing orders which expressly apply to counsel shall be understood to also apply to all parties and their agents.

(21) The execution of this order shall be stayed pending the appeal period (60 days) and any appeal by any party. If no appeal is taken, compliance with this order shall commence within thirty (30) days of the end of the appeal period. If an appeal is taken and the orders of this court are sustained, compliance shall commence within thirty (30) days of the return of the mandate unless otherwise ordered by the Court of Appeals.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Court

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT STAYING MANDATE

(Filed March 19, 1982)

NO. 79-3640 & 79-3642

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR KRAUSE, *et al.*,
Plaintiffs-Appellees,

v.

JAMES A. RHODES, *et al.*,
Defendants,

ATTORNEY GENERAL OF OHIO, *et al.*,
Intervenors-Appellants,

and

KENT STATE UNIVERSITY,
Appellants.

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with

within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

OHIO REVISED CODE

§ 149.43 Availability of public records.

(A) As used in this section:

(1) "Public record" means any record that is required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably

promised, which information would reasonably tend to disclose his identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(B) All public records shall be promptly prepared and made available to any member of the general public at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division.

(C) Chapter 1347. of the Revised Code does not limit the provisions of this section.

*HISTORY: 138 v S 62. Eff 1-18-80.

OHIO REVISED CODE

CHAPTER 1347: PERSONAL INFORMATION SYSTEMS

§ 1347.01 [Definitions.]

As used in Chapter 1347. of the Revised Code:

(A) "State agency" means the office of any elected state officer and any agency, board, commission, department, division, or educational institution of the state.

(B) "Local agency" means any municipal corporation, county, school district, special purpose district, or township of the state or any department, division, institution, instrumentality, board, commission, bureau, or office of any elected officer thereof.

(C) "Special purpose district" means any geographic or political jurisdiction that is created by statute to perform a limited and specific function, and includes, but is not limited to, library districts, conservancy districts, metropolitan housing authorities, park districts, port authorities, regional airport authorities, regional transit authorities, regional water and sewer districts, sanitary districts, soil and water conservation districts, and regional planning agencies.

(D) "Maintains" means agency ownership of, control over, responsibility for, or accountability for systems and includes, but is not limited to, depositing information with a data processing center for storage, processing, or dissemination. An agency "maintains" all systems of records that are required by law to be kept by the agency.

(E) "Personal information" means any information that describes anything about a person, or indicates actions

done by or to a person, or indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person.

(F) "System" means any collection or group of related records that are kept in an organized manner and are under the control of a state or local agency from which information is retrieved by the name of the person or by some identifying number, symbol, or other identifying particular assigned to the person. "System" includes both records that are manually maintained and records that are stored using electronic data processing equipment. "System" does not include collected archival records in the custody of or administered under the authority of the Ohio historical society, published directories, reference materials or newsletters, or routine information maintained for the purpose of internal office administration, the use of which would not adversely affect a person.

(G) "Interconnection of systems" means a linking of systems that belong to more than one agency or to an agency and other organizations and which system permits each agency or organization involved in the linking to have unrestricted access to the systems of the other agencies and organizations.

(H) "Combination of systems" means a unification of systems that belong to more than one agency or to an agency and other organization into a single system in which the records that belong to each agency or organization may or may not be obtainable by the others.

HISTORY: 136 v S 99 (Eff 1-1-77); 137 v S 224. Eff 8-26-77.

Opposition

No. 81-1986

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ATTORNEY GENERAL OF OHIO, INTERVENOR,
Petitioner,

vs.

ARTHUR KRAUSE, et al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SANFORD JAY ROSEN
COUNSEL OF RECORD
ROSEN & REMCHO
155 Montgomery Street
8th Floor
San Francisco, CA 94104
415/433-6830

ELLEN SUE GOLDBLATT
LANDELS, RIPLEY & DIAMOND
450 Pacific Avenue
San Francisco, CA 94133
415/788-5000

RICHARD LARSEN
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd St.
New York, NY 10036
212/944-9800

Of Counsel:
ANDREA L. BIERY
ROBERT S. BAKER
DAVID ENGDAHL
REES DAVIS
AMITAI SCHWARTZ
NICHOLAS B. WARANOFF

BOWNE-PERHAM WALSH • 120 NINTH ST. • S.F., CA 94103 • (415) 863-6300

QUESTIONS PRESENTED

I. Is Review By This Court Appropriate Where The Decision Turns Largely on the District Court's Factual Determinations and Exercise of Discretion Both of Which Have Been Reviewed and Affirmed by the Court of Appeals?

II. Should This Court Review The Decision Below Where There Is Neither A Conflict Among The Circuits Nor An Important Question of Law Which Needs To Be Resolved?

III. Is Review By This Court Appropriate Where Application of State Law Standards Would Not Alter the Result Below?

LIST OF PARTIES

The petitioner is the Attorney General of the State of Ohio on behalf of the Ohio National Guard, the Ohio Bureau of Criminal Investigation and the Ohio Highway Patrol. Petitioner was the intervenor-appellant in the court below. Petitioner is represented by Burt Fulton, Sixth Floor, Bulkley Building, Cleveland, Ohio 44115.

Respondents are the plaintiffs-appellees in the courts below, their attorneys and legal workers and intervenor Peter Davies. Respondents are represented by Sanford Jay Rosen, Rosen & Remcho, 155 Montgomery Street, 8th Floor, San Francisco, California 94104.

Intervenor-appellant Kent State University was represented in the courts below by Shimon Kaplan, 1500 Leader Building, Cleveland, Ohio 44114.

The United States of America, also an intervenor in the court below, was represented by Patrick McLaughlin, 400 U.S. Courthouse, Cleveland, Ohio 44114.

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No. 81-1986

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ATTORNEY GENERAL OF OHIO, INTERVENOR,

Petitioner,

VS.

ARTHUR KRAUSE, et al.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

Orders of District Court Judge Don J. Young are set forth in the appendix to

the Petition For Writ of Certiorari as follows:

Order of October 3, 1974 . . . . at A19

Order of October 22, 1974 . . . at A21

Order of February 13, 1975 . . . at A23

Memorandum and Order of March 25, 1975 . . . . . at A25

Memorandum and Order of May 10, 1975 . . . . . at A30

Memorandum and Order of September 15, 1976 . . . . . at A33[1/]

Additional orders of Judge Young are set forth in the appendix to this Brief In Opposition as follows:

Excerpt From Pretrial Order of April 24, 1975 . . . . . at RA1

Memorandum and Order of May 8, 1975 . . . . . at RA3

Memorandum and Order of June 24, 1976 . . . . . at RA9

1/ The appendix to the Petition is cited hereinafter as "Pet.App. p. A__."

Memorandum and

Order of April 25, 1977 . . . . . at RA15[2/]

Orders of District Court Judge William K. Thomas are set forth in the appendix to the Petition as follows:

Memorandum and Order of February 28, 1979 . . . . . at A35

Rule 58 and Order of Judgment of March 12, 1979 . . . at A65

These orders were recently published together and appear at 535 F.Supp. 338.

The Opinion of the Court of Appeals for the Sixth Circuit is set forth in the appendix to the Petition at page A1. This opinion was published and appears at 671 F.2d 212.

2/ The appendix to Respondent's Brief in Opposition is cited hereinafter as "Resp.App. p. RA__."

JURISDICTION

Respondents accept petitioners' statement of jurisdiction but urge that this Court, in exercising its judicial discretion, should deny the writ.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution, First Amendment, is set forth in the Petition at page 2.

Ohio Revised Code §149.43, Availability of Public Records, is set forth in the appendix to the Petition at page A73. Ohio Revised Code §1347, Personal Information Systems, which respondents refer to but assert is not involved, is set forth in the appendix to the Petition at page A74.

Federal Rules of Civil Procedure, Rule 26(c) provides in pertinent part:

> (c) PROTECTIVE ORDERS. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense. . . .
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

STATEMENT OF THE CASE

The instant proceedings represent the last chapter in the twelve years of litigation arising from the tragic and unwarranted shootings of thirteen students on the campus of Kent State University on May 4, 1970. The question that has been at issue is whether essentially the entire record of the civil damages cases, disclosing the facts surrounding the tragedy at Kent State, will

be available for future review by the public, including scholars, or whether important portions of the record of this event may be sealed.

The specific documents which are at issue in these proceedings were gathered during discovery in the civil suit brought by the nine wounded students and the personal representatives of the estates of the four students who were killed, alleging a violation of their civil rights under 42 U.S.C. § 1983.

The instant petition for certiorari is brought by the Ohio Bureau of Criminal Identification, the Ohio State Highway Patrol and the Ohio National Guard (collectively "the petitioners") seeking review of an Order of the United States Court of Appeals for the Sixth Circuit entered on February 18, 1982 (Edwards, C. J.; Lively, J.; Phillips, J.) which

affirmed the March 12, 1979 Order of the United States District Court for the Northern District of Ohio, Eastern Division (Thomas, J.). The District Court's March 12 Order vacated the June 24, 1976 Protective Order of the Court (Young, J.). The June 24 protective order barred the public dissemination of documents and deposition testimony acquired by the parties through discovery in the underlying Kent State civil cases, which had not become part of the official record of the case, except with the written permission of the person testifying or the agency producing the documents.

The Order of March 12, 1979 was carefully drafted by Judge Thomas after he considered the interests of the public and the parties and entities involved. Indeed, before entering its Order, the District Court conducted evidentiary and

other proceedings in open court on parts of six days, conducted its own investigation, considered numerous affidavits and other exhibits, and explained its actions in a careful Memorandum and Order dated February 28, 1979.

The March 12, 1979 Order permits the dissemination of the majority of the discovery materials, though requiring in many instances, redaction from the documents of the names of witnesses, interviewing officers and third parties. The inherent reasonableness of the District Court's approach essentially was recognized by the U.S. Justice Department, whose "investigative" materials, FBI "302" Statements, are covered by the Order. The United States determined not to appeal the District Court's Order. In addition, Kent State University which appealed the District Court's order

covering investigative materials of the Kent State Police Department has not petitioned this Court for further review.

In this opposition brief, respondents set forth the reasons why this Court should not review the decisions of the two lower courts.[3/]

A. History of Discovery Rulings Prior To Remand of the Underlying Civil Case

Prior to the filing of the pretrial order in the underlying lawsuit, the District Court permitted broad discovery with a disposition toward maintaining an open public record. (See e.g. Memorandum

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3/ Respondents also assert that Judge Thomas' approach and decision were correct as a matter of trial court discretion, discovery law, Ohio public disclosure law and the First Amendment. They will, of course, brief these issues in full should this Court determine to review this case on its merits.

and Order, March 25, 1965, Pet. App. p. A25.) The District Court consistently denied motions to quash subpoenas duces tecum made by the Ohio National Guard, Ohio State Highway Patrol, and others. Protective Orders were routinely denied, or imposed briefly, and then only for the most compelling of reasons. With two exceptions, attempts prior to trial to limit the scope of discovery and/or public disclosure of the fruits of discovery failed.

For example, on April 28, 1975 the United States moved to quash certain subpoenas and requested, inter alia, the return to the United States at the conclusion of the litigation of the materials produced pursuant to the subpoenas. The District Court overruled the motion and concluded, "that there is no demonstrated need for the return of the

photocopied documents of which the government retains an original copy." (Memorandum and Order of May 8, 1975, Resp.App. p. RA3 at RA6.)

On February 17, 1975 Stephen Parisi entered his appearance as counsel for Kent State University ("KSU") and five of its employees whose depositions were taken from March to May of 1975 (the "KSU witnesses"). Although the KSU witnesses' counsel made objections to future use of the discovered testimony at the close of each deposition at no time prior to trial was any protective order sought relating to these depositions. A protective order was first contemplated in the District Court's April 24, 1975 pretrial order which provided that:

> "(2) Counsel for Kent State University is granted leave to file a motion concerning restriction on the use of depositions." (Resp.App. p. RA2.)

Despite this invitation, not until approximately four months later, near the close of the first trial, did the KSU witnesses file a motion for a protective order on the grounds that public inspection of their depositions would lead to "annoyance, embarrassment and harassment." On August 20, 1975 the motion was heard in open court. The District Court indicated that it agreed with the basic thrust of the motion and that counsel should make an effort to draft a proper order. (See Excerpt from Transcript of Trial Proceedings of August 20, 1975, Pet.App. pp. A17-18.) The KSU witnesses did not act on this invitation until November 10, 1975 more than two months after the District Court had entered a final judgment on the merits of the underlying lawsuit on September 2, 1975 following jury verdicts favorable to the

defendants. The KSU witnesses' Proposed Memorandum and Order sought to limit the use, of their depositions only, to preparation for and conduct of the trial itself, prohibiting disclosure to other persons. During the next three months the plaintiffs and the KSU witnesses submitted further briefs to the court on this issue. On the day following the final protective order brief, January 23, 1976 the plaintiffs' appeal in the underlying lawsuit was docketed in the Sixth Circuit.

It was not until June 24, 1976 five months after the last round of protective order pleadings in the District Court were on record, and more than a month after plaintiffs had filed opening briefs in their appeal from the adverse judgment in the first trial that the District Court filed and caused to be journaled a

protective order. The June 24, 1976 protective order was extremely broad and barred the public disseminaton of all discovery testimony and documents which had not become part of the official record of the case, without the prior permission of the person testifying or the agency producing documents. (Memorandum and Order of June 24, 1976, Resp.App. pp. RA9-14.)[4/]

4/ Before a protective order issues the material sought to be protected must in fact be confidential. See e.g. Reliance Insurance Co. v. Barron's, 428 F.Supp. 200 (S.D.N.Y. 1977), United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), rev'd on other grounds, sub nom., Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Prior to the entry of the June 24, 1976 protective order the materials produced during discovery in the underlying cases were part of the public record, were available to the public for inspection and access to certain of these materials was provided to the public by the court. See,

(Continued on next Page)

On July 8, 1976 the plaintiffs filed a motion in District Court to amend and vacate the protective order. The District Court denied the motion in a Memorandum and Order filed on September 15, 1976. (Pet.App. p. A33) In denying plaintiffs' motion, the court apparently relied on the reasons it stated during the hearing of August 20, 1975, i.e., the protection of the property and privacy interests of those persons providing the discovery materials. Plaintiffs appealed the

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(Continuation of Footnote 4)

Affidavit of William Alan Gordon discussed at p. 22, infra. Therefore, in the circumstances of this case, respondents contend that entry of the June 24, 1976 protective order was an abuse of discretion because, inter alia, the order was not timely. Respondents have fully briefed this issue below and reserve the right to raise it in a future brief on the merits if the Petition is granted.

order denying their motion to vacate to the Sixth Circuit on October 15, 1976. denying their motion to vacate to the Sixth Circuit on October 15, 1976.

On March 24, 1977 Peter Davies, an author and historian who had assisted the plaintiffs as a volunteer legal worker, moved the District Court to vacate its protective order of June 24, 1976. In a Memorandum and Order dated April 25, 1977 Davies' motion was denied by the District Court. (Resp.App. pp. RA15-20) In denying Davies' motion, the District Court expanded its rationale for the protective order to include protection of some undefined copyright interest of persons from whom the discovery was taken, as well as whatever privacy and property interests they might enjoy. Davies appealed this denial on May 12, 1977.

Before a date for oral argument on the protective order appeals was set, the Sixth Circuit decided the plaintiffs' appeal from the dismissal of the underlying Kent State cases. By its opinion and order of September 12, 1977 the Sixth Circuit remanded the underlying Kent State civil damage cases to the trial court for a new trial. Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) cert. denied 435 U.S. 924 (1978). Thereafter, action on the protective order appeals was suspended pending the new trial.

B. History of the Discovery Rulings After Remand of the Underlying Civil Trial

On June 27, 1978 plaintiffs and their attorneys again moved the District Court to amend and vacate the protective order of June 24, 1976. Before this motion was heard, Judge Young, who had made all the

prior rulings, recused himself from the Kent State Cases. Judge William K. Thomas was appointed to preside over the second trial and all attendant proceedings. On October 13, 1978 Judge Thomas denied plaintiffs' motion because of the imminence of the second trial. (See, Memorandum and Order of February 28, 1979, Pet.App. p. A35 at A38.)

The underlying Kent State cases were settled on January 4, 1979. Thus the civil damages litigation came to a close except for the appeals on the issue of attorney's fees and the issue of the protective order.[5/]

5/ The appeal on the issue of attorneys' fees was decided by the Sixth Circuit on March 27, 1981. The Court of Appeals affirmed the Settlement Orders of the District Court. Krause v. Rhodes, 640 F.2d 214 (1981). cert. denied, ___ U.S. ___, 102 S.Ct. 140 (1982).

Plaintiffs and their attorneys and Peter Davies renewed their motion to vacate the protective order on January 8, 1979. The hearings on the motion to vacate began on January 9; continued on January 15 and 17 with the examination of Steven Keller, plaintiffs' custodian of records; on January 18 with oral argument; on February 6 with an in-court examination of several categories of documents; and on March 9, when Judge Thomas reviewed with the parties his proposed Rule 58 Order. The District Court journaled its Rule 58 Order on March 12, 1979.

During the January 9, 1979 hearing the District Court indicated the broad protective order of June 24, 1976 could not outlive the dismissals of the underlying lawsuit, and suggested that plaintiffs, their attorneys and Peter Davies seek a

remand of the then pending protective order appeals from the Sixth Circuit. (See Excerpt from Transcript of Proceedings of January 9, 1979, Resp.App. p. RA21.) The cases were remanded for further proceedings by the District Court on January 17, 1979.

As the protective order of June 24, 1976 was not limited to the depositions of the five KSU witnesses but covered all discovery materials, the District Court determined that all the agencies that had produced material pursuant to discovery procedures in the underlying cases should be represented at the hearings on the issue of the final disposition of these materials. Thus, the District Court permitted the intervention of the United States Justice Department on behalf of the Federal Bureau of Investigation; the Ohio Attorney General [represented by

attorneys for defendants in the underlying cases] on behalf of the Ohio Bureau of Criminal Investigation, the Ohio State Highway Patrol and the Ohio National Guard; and the Portage County Prosecutor's office on behalf of the Court of Common Pleas of Portage County which had conducted the Special Grand Jury investigation. The attorneys for the KSU witnesses also represented the Kent State University Police Department.

On January 12, 1979 plaintiffs and their attorneys made a motion to have certain affidavits and other evidentiary materials included in the record of the renewed motion to vacate the protective order. The materials submitted can be summarized as follows:

1) The affidavits of Steven R. Keller and James DeJ. Pemberton, plaintiffs' paralegals, who were in charge of the

Kent State files, are descriptive. Their affidavits and Mr. Keller's testimony, describe the quantity, scope and kind of materials contained in plaintiffs' attorneys' files. Further, these affidavits set forth the access which various persons had to these materials before any protective order was in force and the difficulty that will be encountered in separating materials covered by the June 24, 1976 protective order from materials -- such as those not acquired through discovery -- which were never covered by any protective order. Plaintiffs acquired well in excess of 30,000 pages of material relating to the Kent State shootings and the resulting investigations through discovery.

2) The affidavit of William Alan Gordon, which states that before the protective order of June 24, 1976 was

entered one of Judge Young's clerks provided him with access to various depositions, including depositions of some of the KSU witnesses whose initial motion resulted in the issuance of the broad protective order of June 24, 1976.

3) The affidavits of Peter Davies, Jerry Lewis, Ph.D. and Thomas Hensley, all of which relate to the interest of and importance to the scholarly community of free public access to the documentation surrounding the Kent State shootings and resultant litigation.

4) The affidavits of Sanford Jay Rosen, plaintiffs' lead counsel, which set forth the negotiations of plaintiffs' attorneys with the archivist of Yale University for a permanent repository of materials relating to the Kent State tragedy.

On January 15 and 17, 1979 Steven Keller took the stand and his examination and cross-examination were conducted at length. Mr. Keller verified the contents of his affidavit and all the exhibits thereto. Further, he testified as to the conditions under which the discovery materials were received, their location and dispersal in the files, access to the discovery materials, and the difficulties that would be encountered in separating out of the files those materials covered by the June 25, 1976 protective order. He testified, inter alia, that plaintiffs and their counsel had secured an enormous quantity of documents and photographs other than through civil discovery -- through their own investigative efforts, pursuant to freedom of information requests, or voluntarily from the defendants. Many of these materials

duplicated materials secured in civil discovery. All manner of materials in the plaintiffs' files (with the exception of the federal grand jury transcripts) had been duplicated and reduplicated, dispersed to numerous attorneys and legal workers, and intermixed with attorney work product. In many instances, it was no longer possible to determine or isolate those materials that had been secured through civil discovery and those secured by other means.

On January 18, 1979 the day after Mr. Keller concluded his testimony, the District Court heard the oral arguments of all parties. Each category of documents was considered in turn and there was general discussion of the principles underlying the Federal discovery process, of First Amendment protections, of privacy protections and of freedom of

information laws. Additionally, the plaintiffs stressed that the majority of the materials in question had been covered by no protective order whatsoever until months after the conclusion of the first civil trial.

At the conclusion of the hearing, the District Court reaffirmed its intention to vacate the Protective Order of June 24, 1976; ruled that the plaintiffs in the underlying cases, members of their families, their attorneys and legal workers and Peter Davies had standing to pursue the matter; ruled that the record on appeal should include the affidavits and oral testimony submitted by plaintiffs, and ruled that no order would issue barring persons from publicly recollecting in the future what they had read in discovery materials. (See

Excerpt from Transcript of Proceedings of January 18, 1979, Resp.App. pp. RA22-27.)

The District Court was still not satisfied that it had sufficient information upon which to rule. Thus, on February 6, 1979 plaintiffs' counsel brought from Columbus, Ohio, to the Court in Cleveland, a sampling of the materials obtained from the Ohio agencies and all of the non-testimonial material received from Portage County and relating to the State grand jury investigation. The District Court personally examined these materials. Further, the District Judge himself traveled to Kent to personally examine copies of documents placed by the plaintiffs in the Kent State University Archives. (Pet.App. p. A57 nt. 17.)

At the conclusion of this thorough and meticulous process, the District Court prepared an extensive Memorandum and

Order which was journaled on February 28, 1979. (Pet.App. pp. A35-64; 535 F.Supp. 338) In this Memorandum Judge Thomas reviewed the proceedings before the District Court as described above, analyzed the relationship between Federal Rule of Civil Procedure 26(c), the First Amendment and other pertinent constitutional and public policy principles, including the right of privacy, and ruled separately on each category of materials. The District Court's conclusions and the results thereof are summarized below.

1. All copies of Federal Grand Jury testimony were ordered returned to the United States Attorney. This portion of the Order was not appealed.
2. All copies of the Portage County Special Grand Jury testimony were

ordered returned to the Clerk of Courts of the Portage County Common Pleas Court. This portion of the order was not appealed.

3. The majority of the documentary materials produced by the Clerk of Courts of Portgage County in fifteen folders, and examined, in camera, by the District Court were found to be in the public domain. Specific rulings allowing release of this material were put on the record at the hearing of February 6, 1979. A small portion of these materials were ordered returned. This portion of the order was not appealed.
4. All depositions were ordered unsealed with provision made for witnesses to appeal to the Court for the sealing of delineated portions of their depositions that might be

used to "gratify private spite or promote public scandal." This portion of the order was not appealed.

5. The Ohio National Guard "201's," the personnel files of the defendant Guardsmen, were ordered returned to the Ohio National Guard. This portion of the order was not appealed.
6. The Kent State University Police Department witness statements, interview reports and advice of rights acknowledgements of those persons who did not testify at trial were ordered redacted and then released. The great majority of the other KSU Police Department materials were ordered released as plaintiffs requested. An appeal was taken from this portion of the order by Kent State University but the University has not petitioned this

Court for review of the Sixth Circuit decision.

7. The District Court found the United States had not sustained their burden of showing "good cause" under Federal Rule of Civil Procedure 26(c) to support the return or sealing of Federal Bureau of Investigation "302" interview reports. However, the redaction of the names of third parties (i.e., witnesses and FBI agents) from all 302's, except those of witnesses who testified at trial, was ordered. This portion of the order was not appealed.

8. The Ohio National Guard, Ohio State Highway Patrol and Ohio Bureau of Criminal Investigation interview reports, witness statements, and other documents were argued by the

State agencies to constitute "privileged" investigatory files and "confidential" law enforcement records which should never be disclosed to the public.

The District Court, after in camera inspection of these documents, specifically found there was no likelihood of an ongoing police investigation being revealed, or of sensitive law enforcement information being compromised as a result of the release of these documents. Moreover, the District Court did not find any recording of law enforcement policies, procedures or plans in these documents.

In light of these findings, the District Court ruled that no "good cause" had been shown to support return or sealing of the State

agencies' documents and that First Amendment interests would be served by the documents release to the public domain. The District Court ordered release of all materials gathered from the State agencies (with the exception of the 201's). In order to protect the privacy of third parties, the redaction of third party names from the interview reports add witness statements of persons who did not testify at trial was ordered. This portion of the order was appealed and is now the sole subject of this Petition for Certiorari.

On March 9, 1979, the District Court convened a final hearing on the protective order issue. At this hearing the February 28, 1979 Memorandum and Order

was reviewed with all the parties, ambiguities were clarified and objections were noted.

On March 12, 1979 the District Court filed its Rule 58 Order rendering final its proposed rulings. On February 18, 1982 the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

I. Review By This Court Is Not Appropriate Because Decision Turns Largely On the District Court's Factual Determinations and Exercise of Discretion, Both of Which Have Been Reviewed and Affirmed by the Court of Appeals.

Under Federal Rule of Civil Procedure 26(c), federal trial courts have vast discretion to manage discovery, and to fashion protective orders when they deem the circumstances appropriate. Indeed, only when a district court has abused its

discretion in granting or denying a protective order may the appellate courts reverse the District Court's action. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Carr v. Monroe Mfg. Co., 431 F.2d 384, 389 (5th Cir. 1970), cert. denied sub nom, Aldridge v. Carr, 400 U.S. 1000 (1971).

There are numerous reported decisions concerning discovery or protective orders relating to assertedly "privileged" investigatory or law enforcement records. Consistently, the courts have stressed district court discretion and the fact that each such case must be decided "on a case by case ad hoc basis by balancing the applicable public policies and the material sought to be discovered in each individual case." Wood v. Breier, 54 F.R.D. 7, 11 (E.D.

Wis. 1972). Accord, United States v. O'Neill, 619 F.2d 222 (3rd Cir. 1980); Timken Roller Bearing Co. v. United States, 38 F.R.D. 57, 64 (N.D. Ohio. 1964).

As this Court held in ruling on the analagous issue of the common law right of access to judicial records:

> "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Nixon v. Warner Communications Inc., 435 U.S. 589, 599 (1978).

The cases referred to above, and the great weight of additional authority, make clear that there is no abuse of discretion in the discovery process where the district court acts with care -- scrupulously reviewing the materials for which protection is sought and balancing all competing interests in the course of

granting or denying discovery or formulating a protective order. As the Sixth Circuit recognized in affirming the District Court's opinion, appellate courts ought not and do not second guess the trial court in this area. (Pet.App. at p. A16; 671 F.2d at 219)

Petitioners, in requesting that this Court review the lower courts' decisions regarding the dissemination of documents obtained in discovery during the underlying civil trials, submit to this Court what are, in essence, questions of fact. Resolution of these questions would require this Court independently to review and evaluate each category of documents. Such repetition of the factual analysis already performed by two lower courts would be a waste of judicial resources and is contrary to this Court's usual practices.

As this Court has stated many times: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Accord, General Electric Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938); Houston Oil Co. of Texas v. Goodrich, 245 U.S. 440 (1918). This is generally so even if it appears the decision below is erroneous, for as Justice Rehnquist stated last term "this Court is not a forum for the correction of errors." Boag v. MacDougall, ___ U.S. ___, 102 S.Ct. 700, 702 (1982) (Rhenquist, White, J.J. and Burger C.J. dissenting and O'Connor J. concurring). Accord: Board of Education of Rogers, Arkansas v. McCluskey, ___ U.S. ___, 50 U.S.L.W. 3998.25-6 (July 2, 1982) (Stevens, Brennan, Marshall, J.J. dissenting). See

also, "Work of the Federal Courts," address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi.

This Court's practice of avoiding review of facts is buttressed by the so-called "two-court" rule, which is wholly applicable here. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." Comstock v. Group of Institutional Investors, 335 U.S. 211, 214 (1948). See also, Branti v. Finkel, 445 U.S. 507, 512 nt. 6 (1980); Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972) and at 203-204 (Brennan, Douglas, Stewart, J.J. concurring in part and dissenting in part.)

As the record in the instant case makes clear, the District Court painstakingly reviewed and evaluated the disputed material. With considerable diligence, the District Court categorized the documents and tailored a careful order disposing of all the contested materials. Judge Thomas ordered that certain absolutely privileged documents, e.g., grand jury transcripts, be returned to the parties from whom they were secured in discovery. Some documents he found to be already in the public domain or otherwise unprivileged; these he ordered released to the respondents. Other documents he found to be partially privileged and he ordered them redacted of names and identifying material -- to protect third parties -- and ordered the redacted documents returned and released to the respondents. The Court of Appeals

has reviewed the District Court's findings; It has sustained them and properly held that: "Judge Thomas certainly did not abuse his discretion." (Pet.App. at p. A17, 671 F.2d at 219).

In the circumstances of this case where the decision is one best suited for a trial court's discretion and that decision has already been approved by an appellate court, the writ of certiorari should be denied.

II. This Case Presents Neither A Conflict Among the Circuits Nor An Important Question Of First Amendment or Discovery Law That This Court Need Resolve

In entering its March 12, 1979 Rule 58 Order, the District Court explicitly followed the decision of the D.C. Circuit, authored by Chief Judge Bazelon, in In re Halkin, 598 F.2d 176 (D.C. Cir. 1979).

Halkin squarely held that "First Amendment rights attach to materials made available through the discovery process." Id. 598 F.2d at 190. The decisions of the Sixth Circuit in the instant case and in National Polymer Products v. Borg-Warner Corp., 641 F.2d 418 (6th Cir. 1981) are in accord. See also, In re Upjohn Co. Antibiotic Cleocin Products, 81 F.R.D. 482 (E.D. Mich. 1979). The Ninth Circuit has also acknowledged that the inherent power of the federal courts to restrict access to documents within the court's control is limited by constitutional considerations. Matter of Sealed Affidavits to Search Warrants etc., 600 F.2d 1256, 1257 (9th Cir. 1979).

In light of the concerns of the First Amendment, the D.C. Circuit held that the proponents of any protective order bear

the burden of making "a specific showing that dissemination of the discovery materials would pose a concrete threat to an important countervailing interest." In re Halkin, 598 F.2d at 193.

Thus, under Federal Rule of Civil Procedure 26(c), a protective order restraining the dissemination of materials obtained through discovery must meet a strict constitutional standard taking into account both the need for a functioning discovery process and the First Amendment interest in unfettered expression. Id., 598 F.2d at 191. The D.C. Circuit articulated three criteria for evaluating a protective order or request for a protective order, stating:

> "[T]he harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on

expression." In re Halkin, 598 F.2d at 191.

The criteria set forth by the D.C. Circuit and expressly adopted by the Sixth Circuit and by Judge Thomas in formulating his February 28 and March 12, 1979 orders, are consistent with the First Amendment principles repeatedly articulated by this Court. See e.g., Landmark Communications Inc. v. Virginia, 435 U.S. 829, 844 (1978); Carrol v. President and Commissioners of Princess Anne, 393 U.S. 175, 183 (1968). The decisions of the Sixth, Ninth and D.C. Circuits cited above represent the modern trend of the law and are not in conflict with the holdings of any other Circuits.

The Second Circuit in International Products Corp. v. Koons, 325 F.2d 403 (2nd Cir. 1963), upheld a protective order restricting disclosure of material secured in discovery or filed with the

district court, however, it refused, expressly because of the First Amendment, to sustain the portion of the protective order that sealed "writings (other than papers filed in court) or information which might have come into their possession otherwise than through the court's processes." 325 F.2d at 409. Thus, in Koons the Second Circuit did not suggest that the First Amendment is not implicated by and need not be considered in passing upon restrictive protective orders. Rather, the Court of Appeals balanced all the competing interests, including First Amendment interests, and obviously concluded that in the cirumstances of that case, which involved foreign policy considerations, there had been shown "a concrete threat to an important countervailing interest" i.e., "good cause" had been shown to balance

away defendants' First Amendment interests.[6/]

The appropriateness of the balancing approach adopted by the lower courts in ruling on these issues is supported by the opinion of this Court in Nixon v. Warner Communications, Inc. 435 U.S. 589 (1978). In Warner Communications, which

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6/ In Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976), a case involving communications by counsel in a Rule 23 class action suit, the Third Circuit misread the analysis in Koons and only by way of dictum suggested that "parties and counsel, by taking advantage of or part in the discovery processes, [may] implicitly waive their First Amendment rights freely to disclose or disseminate the information obtained through those processes." Even this dictum does not foreclose the need to balance the First Amendment interests, for example of the public, in making a "good cause" determination under Rule 26(c). Cf. Bernard v. Gulf Oil Co., 619 F.2d 459 (5th Cir. 1980). Aff'd on other grounds, 452 U.S. 89 (1981) in which the Fifth Circuit held that the First Amendment prevents a court from forbidding parties or their counsel to communicate with potential class members.

involved the analogous issue of the common law right to inspect and copy judicial records, this Court recognized a strong presumption in favor of public access to judicial records and acknowledged that the decision as to access generally depends upon "weighing [of] the interests advanced by the parties in light of the public interest and the duty of the courts." 435 U.S. at 602. Accord: Re Application of National Broadcasting Co. Inc., 635 F.2d 945 (2nd Cir. 1980); Crystal Grower's Corp. v. Dobbins, 616 F.2d 458, 461 (10th Cir. 1981).

The circumstances of the instant case required the District Court to weigh the public's right to know the full record of an important historical event and the plaintiffs' and their attorneys' First

Amendment rights to disseminate information in their possession against the privacy interests of individuals and the institutional concerns of the agencies which generated the documents. After reviewing the record of the District Court's lengthly proceedings the Sixth Circuit concluded that Judge Thomas' orders "were drafted with careful recognition of the competing interests" and "scrupulously followed the applicable law." (Pet.App. at A17, 671 F.2d at 219). Respondents concur.

Since all the civil and criminal lawsuits arising out of the tragic shootings at Kent State are now concluded the State agencies cannot be seriously harmed by dissemination of the discovery materials. Furthermore, the presumption in favor of disclosure "is especially strong in a case like this where the evidence

shows the actions of public officials, [including] law enforcement personnel." Re Application of National Broadcasting Co., 635 F.2d at 952. For,

> "Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public."
>
> Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975).

Thus, while ordering disclosure because of First Amendment interests, the District Court took every possible precaution to protect the privacy rights of individuals. The Court not only ordered redaction of third parties' names, but also conducted hearings to permit individuals whose interest might be offended to show that the statements or depositions might, even as redacted, violate privacy rights or be used "to gratify private spite or promote public

scandal." (Pet.App. at p. A11; 671 F.2d at 217.)

As demonstrated above this case presents neither a conflict among the circuits nor an important unresolved question regarding the relationships between First Amendment, privacy and discovery law. Therefore, this Court should exercise its discretion to deny the writ.

III. Review By This Court Is Not Appropriate Because Application Of State Law Standards Would Not Alter The Result Reached Below.

Petitioners argue that this Court should review the instant case because the District Court applied an incorrect standard in reaching its decision to permit public disclosure of redacted versions of documents generated by the Ohio Bureau of Criminal Investigation,

the Ohio State Highway Patrol and the Ohio National Guard.

This is a frivolous argument, for as petitioners' counsel conceded at oral argument before the Sixth Circuit the documents in question must be made available for public inspection by these State agencies under Ohio's public records act, Ohio Revised Code §149.43. (Pet.App. p. A73.) Petitioners rely on this statute in arguing for return of the documents to the State agencies but they omit to inform the Court that, under the terms of the statute, the agencies would be required to disclose the documents at issue. Instead, petitioners mislead this Court by citing the case of Wooster Republican Printing Co. v. City of Wooster, 56 Ohio St.2d 126, 383 N.E.2d 124 (1978), which was decided under the pre-amendment version of §149.43, while

omitting to cite State ex rel. Beacon Journal Publishing Co.v. University of Akron, 64 Ohio St.2d 392, 415 N.E.2d 310 (1980) which construes the present statute.

As amended in 1980, Ohio Revised Code §149.43(B) requires that all "public records" be made available to the general public for inspection and copying and instructs governmental agencies to maintain such records in a manner designed to facilitate broad public access. R.C. §149.32(C) clearly states that the Ohio privacy act (R.C. §1347) does not limit the provisions of the public records act. See, Ohio Attorney General's Opinions No. 81-014.

In University of Akron, the Supreme Court of Ohio held that law enforcement records compiled prior to the amendment of R.C. §149.43 are available to the

public provided they are not excluded from the definition of "public records" as either a "confidential law enforcement investigation record" or a "trial preparation record." 415 N.E.2d at 314. R.C.§149.32(A)(2), defining "confidential law enforcement investigatory record," restricts release only where there is a high probability of disclosure" of one of four enumerated factors. R.C.§149.43(a)(4), defining "trial preparation record," restricts release only when a record contains information "specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action. . . ." These exemptions are to be construed strictly against the custodian of state agency records when disclosure is sought so that the exceptions do not swallow up

the rule. Univserity of Akron, 415 N.E.2d at 314.

In University of Akron the Ohio Supreme Court held that factual police reports regarding the rape and death of a student, made in the course of fulfilling the duty of all law enforcement agencies to generate ongoing offense reports, were not exempt from public disclosure 415 N.E.2d at 314. The materials at issue in this case similarly chronical the events surrounding the tragic shootings at Kent State. Based on Judge Young's findings that these materials do not reveal sensitive law enforcement information, and in light of his redaction orders it is obvious that the documents petitioners seek to prevent respondents from disseminating must, under Ohio law, be disclosed upon request by the agencies themselves.

Since public disclosure of the documents is mandated both under the District Court's March 12, 1979 Order and under Ohio law there exists no reason for this Court to exercise its discretionary power of review.

CONCLUSION

For the above reasons, Respondents urge that the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

SANFORD JAY ROSEN, Counsel
of Record
Rosen & Remcho
155 Montgomery Street
8th Floor
San Francisco, CA 94104
415/433-6830

ELLEN SUE GOLDBLATT
Landels, Ripley & Diamond
450 Pacific Avenue
San Francisco, CA 94133
415/788-5000

RICHARD LARSEN
American Civil Liberties Union
132 West 43rd St.
New York, NY 10036
212/944-9800

Of Counsel:

Andrea L. Biren
Robert S. Baker
David Engdahl
Rees Davis
Amitai Schwartz
Nicholas B. Waranoff

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed April 24, 1975)

KENT STATE CASES

Civil No. C 70-544

ARTHUR KRAUSE, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

EXCERPT FROM
PRETRIAL ORDER

This cause came on for a pretrial conference on April 18, 1975, at Cleveland, Ohio pursuant to regular assignment and the Court APPROVES and ORDERS the following action taken at that conference:

* * *

(2) Counsel for Kent State University is granted leave to file a motion concerning restriction on the use of depositions.

* * *

/S/ Don J. Young
United States District Judge
N.D. Ohio, W. Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed May 8, 1975)

KENT STATE CASES

Civil No. C 70-544

ARTHUR KRAUSE, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

MEMORANDUM AND ORDER

This cause came to be heard upon two motions of the United States to quash subpoenas duces tecum issued to an agent of the FBI and a United States Attorney.

As to the subpoena issued to FBI Agent William Chapin, the plaintiffs respond in their memorandum filed May 5, 1975 that they do not oppose the motion to quash.

Therefore the request for an order prohibiting the taking of testimony is moot.

As to the motion filed by the United States on April 28, 1975, concerning the subpoena duces tecum issued to the United States Attorney for the Northern District of Ohio, plaintiffs, in their response of May 5th, state that they do not oppose that portion of the motion prohibiting the testimony of the United States Attorney. After a careful review of the motion and response, the Court finds that there are only two areas of dispute over material to be produced because either the Government has produced the requested material or the plaintiffs do not oppose the motion to quash.

One area of dispute involves item 11 of plaintiffs' subpoena which requests all charts purporting to represent a cross-section of the terrain surrounding

Taylor Hall on the Kent State University Campus. Apparently these two-dimensional charts were used as exhibits in United States v. Shafer. The Government states that the FBI has possession of them and that they will be produced if the Court so directs. Plaintiffs request that the charts be given to the custody of the Clerk of Northern District of Ohio in Cleveland. The Court finds that since the charts at issue are technically the property of this Court, they should be returned to the custody and possession of the Clerk for this District in Cleveland and made available for inspection and use in this litigation.

The other area of disagreement concerns the motion of the United States for the return to the United States at the conclusion of this litigation of material produced pursuant to the subpoena at

issue. Plaintiffs agree to the return of material such as photographs, models, charts and handwritten original statements, but resist the return of photocopied material, the originals of which still remain in the custody of the United States. The Court concludes that there is no demonstrated need for the return of the photocopied documents of which the Government retains an orginal copy.

Therefore, for the reasons stated herein and for good cause appearing, it is

ORDERED that the motion filed by the United States on April 24, 1975 to quash a subpoena issued to Agent William Chapin should be and hereby is granted, and it is

FURTHER ORDERED that the subpoena duces tecum issued to FBI Agent Wiliam Chapin should be and hereby is quashed, and it is

FURTHER ORDERED that the motion of the United States to quash a subpoena issued to

the United States Attorney for the Northern District of Ohio should be and hereby is sustained in part and overruled in part, and it is

FURTHER ORDERED that the subpoena duces tecum issued to the United States Attorney for the Northern District of Ohio should be and hereby is quashed as to items 1, 2, 9, 12 and 13 listed in the Appendix to said subpoena, and it is

FURTHER ORDERED that the United States should be and hereby is required to produce item 11 of said subpoena to the United States Attorney for the Northern District of Ohio and give custody of the material listed therein to the Clerk of the Northern District in Cleveland, Ohio, and said material shall be maintained in the custody and possession of the Clerk for use in this litigation, and it is

FURTHER ORDERED that the plaintiffs should be and hereby are required to return to the United States any and all material produced pursuant to the instant subpoena, except photographically reproduced copies of documents, the originals of which remain in the custody of the United States.

IT IS SO ORDERED.

/S/ Don J. Young

United States District Judge
N.D. Ohio, W. Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed June 24, 1976)

KENT STATE CASES

Civil No. C 70-544

ARTHUR KRAUSE, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

MEMORANDUM AND ORDER

During discovery in these cases the Court ordered that very broad discovery be permitted. In fact, extensive discovery was had, and depositions of many parties and witnesses were taken. Many of the witnesses objected to being deposed, but nevertheless gave their depositions.

Shortly before the trial commenced, at a pre-trial conference, the Court made the following order, which was entered on April 24, 1975:

> (2) Counsel for Kent State University is granted leave to file a motion concerning restrictions on the use of depositions.

Thereafter, the trial proceeded. Toward the end of the trial the witnesses David A. Ambler, Chester A. Williams, Richard E. Dunn, Thomas F. Kelley and Robert E. Matson, through counsel for Kent State University, filed the motion permitted by the April 24, 1975 order. The motion came on for hearing on August 20, 1975, as shown by pages 12,003 to 12,011 of the transcript of the trial, and was granted by the Court in an oral opinion ordering that anybody who wanted to use any of the discovery material had to get the permission of the person who

was being discovered before he used it. Although the motion was filed only on behalf of certain witnesses, the Court's oral order was expressly made to apply to all parties, witnesses, or persons producing any sort of materials upon discovery.

The Court instructed counsel for the movant to draft a journal entry expressive of the Court's order, and to submit it to all counsel. Any who did not agree with the proposed entry were to submit their own drafts. If varying drafts were submitted, the Court would fix the form of the journal entry.

Ultimately moving counsel submitted to the Court a very elaborate proposed memorandum and order. Opposing counsel did not submit any alternative form of order, but did file a brief opposing the

entry of any order, to which moving counsel replied.

A number of problems are now presented. In the first place, the Court on August 20 granted the motion, and stated specifically what order was being made, but since a court speaks only by its journal, in order to effectuate the order, it is necessary to enter it upon the journal. The Court only sought pursuant to Local Civil Rule 5(b), to gain the assistance of counsel in fixing the form of the judgment entry.

The time limitations of Local Civil Rule 5(b) were not conformed to by counsel, and in the meantime the entire case is on appeal, which makes it questionable whether the Court has any jurisdiction to make any orders until the appeals have been concluded. Nevertheless, the Court will attempt to

enter the order which it orally made on August 20, 1975.

Therefore, for the reasons stated herein, and in the transcript of the record of the proceedings on August 20, 1975, good cause therefor appearing, it is

ORDERED that all testimony given, and all materials of every kind and description produced, on discovery in these cases, are, and remain, the sole property of the person testifying, or producing such materials. Except as the same may be offered in any future proceeding in these cases, no use for any other purpose whatsoever shall be made of any of such testimony or materials that has not been made a part of the record of the trial of these causes without the express written permission of the person testifying or producing such materials; and it is

FURTHER ORDERED that none of the parties hereto, or their counsel, who have possession of any transcripts of such testimony, or of any of such materials, shall permit the same to be copied or used by any person whatsoever without the express written permission of the person testifying or producing such material, except for the purpose of offering or using the same in any future proceedings in these causes.

IT IS SO ORDERED.

/S/ Don J. Young

United States District Judge
N.D. Ohio, W. Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Filed April 25, 1977)

KENT STATE CASES

Civil No. C 70-544

ARTHUR KRAUSE, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

MEMORANDUM AND ORDER

This cause is before the Court upon motion of Peter Davies to vacate the protective order filed in this action on June 24, 1976; and upon the motions of certain witnesses for an enlargement of time to file briefs in opposition to Mr. Davies' motion and for leave to file a

motion for leave to file the aforementioned motion for enlargement of time.

By Memorandum and Order filed September 15, 1976, the Court overruled a motion by plaintiffs to vacate the protective order of August 20, 1975 (filed in written form on June 24, 1976). The Court adheres to that ruling. Mr. Davies is neither a party litigant nor a participant in the trial of this action. For these additional reasons his motion will be overruled.

The question of the movant's standing is considerably clouded by the ruling of the United States Court of Appeals for the Sixth Circuit in the case of C.B.S., Inc. v. Young, 522 F.2d 234 (1975). In that case the Court of Appeals held in effect that one who was not a party to this case, and who had made no attempt to intervene as a party, had standing to attack an order in

this case by an independent action in the Court of Appeals. This Court is unwilling to extend the Court of Appeals' ruling by holding that anyone who fancies himself aggrieved by one of its protective orders can intervene, or without even seeking leave to intervene as of right ask that the protective order be vacated.

It is clear, also, that the movant totally misapprehends both the meaning and the purpose of the protective order made on August 20, 1975. These are both clearly shown by the crucial wording of the order, that use of discovery testimony and evidence which did not become a part of the record of the case was not to be had <u>without the permission of the person testifying or producing the evidence</u>. This makes clear that the order was not designed as an impermissible prior restraint upon free expression, but to prevent the

"pirating" of the property rights which the persons protected had in their own thoughts, words, and material. The protective order is no more a restraint upon First Amendment rights than are the copyright and other literary property laws, or the laws prohibiting robbery.

The movant appears from his memorandum and supporting documents to have made for himself considerable reputation, and presumably some money, by exploiting the words of people involved with this unhappy litigation. He should be the last, instead of the first, to urge that anyone be deprived of his literary or historical property.

The witnesses' motion for leave to file the motion for enlargement of time will be overruled. Leave of Court is not required to file a motion; a person merely files it. The motion may be granted or denied

for any of a variety of reasons, one of which may be untimeliness.

The witnesses' motion for enlargement of time to file a brief opposing Mr. Davies' motion will be overruled as moot.

Therefore, for the reasons stated, good cause appearing, it is

ORDERED that the motion of Peter Davies to vacate the protective order filed June 24, 1976, be, and the same hereby is, overruled; and it is

FURTHER ORDERED that the motion of the witnesses for leave to file a motion for enlargement of time be, and the same hereby is, overruled; and it is

FURTHER ORDERED that the motion of the witnesses for enlargement of time within which to file a brief opposing Mr. Davies'

motion be, and the same hereby is, overruled as moot.

IT IS SO ORDERED.

/S/ Don J. Young

United States District Judge
N.D. Ohio, W. Division

EXCERPT FROM TRANSCRIPT OF
PROCEEDINGS OF JANUARY 9, 1979

[27] THE COURT: . . . I would think that this very broad order cannot outlive these dismissal entries. It must be set aside.

MR. PARISI: Well, we are not --

THE COURT: And I will not --

and if it is true these things are still somehow in the bowels of the Sixth Circuit Court of Appeals, awaiting their schedule, then I would directly recommend to the Plaintiffs that they immediately move to remand these.

EXCERPT FROM TRANSCRIPT OF
PROCEEDINGS OF JANUARY 15, 1979

[331] THE COURT: I at this time formally declare the record in the matter that relates to the motion to amend and vacate Judge Young's order and the matter that relates to Mr. Parisi's counter motion and, indeed, the oral motions that have been made here by the various parties of interest, to consist of not only the oral testimony of Mr. Keller, his various affidavits, the other affidavits that you attach to your motion and, of course, the record certainly includes the oral statements of counsel on behalf of each of the various parties of interest because I think it's all quite relevant to any appellate consideration of the issues that we've been discussing.

MR. ROSEN: Thank you, your Honor.

With respect to the standing of the parties, I represent -- just so that the record is very clear as to whom I represent and what we take their standing interest to be -- they are the plaintiffs themselves and, necessarily, they would have to include immediate members of the [332] plaintiffs' families who have themselves been privy to some of this information; they are all counsel of record for plaintiffs in these proceedings, and legal assistants, some of whom may also be attorneys at law.

Among those would also be included one Mr. Peter Davies who, in addition to having been a legal assistant at least through the conclusion of the first civil trial, is also an acknowledged author and lecturer on Kent State and matters pertaining to the Kent State incident.

And we take the interests of these individuals to meet the two-tiered standing test in the following respects:

All of these persons are subject to the existing protective order and, for all we know, would be subject to any future protective orders. Therefore, all of these persons would be interdicted from disseminating information and perhaps from speaking and, therefore, suffering an injury in fact. And inasmuch as it has to do with their communications, they have personal constitutional First Amendment interests in being able to speak and disseminate.

Mr. Davies, in addition, as a historian, [333] has an interest in receiving information -- further information for the purpose of furthering his historical or other literary studies.

And we believe that the standard [sic] doctrines enable us in addition to assert the interests of potential authors, be they readers of books, newspapers, who would wish to receive information, or other potential authors.

Now, with respect to the point about the Freedom of Information Act:

We weren't suggesting that the Court has jurisdiction over Freedom of Information claims as such. We were suggesting the Freedom of Information Act certainly provides a statutory analogy to what the Court might appropriately do in considering its exercise of power over discovery.

With respect to the dissemination of these materials being plaintiffs' own making:

I just wish to reiterate the point that the materials were disseminated only to progress the litigation. It was a complex

case that necessitated communicating with various lawyers, lawyer assistants and clients and witnesses who happened to be spread out around the country and, [334] of necessity, had to have papers and files available to them for study.

There would be no other way to manage the case unless a litigation team wholly consisting of attorneys in Cleveland or this area had been assembled -- which was not in the cards.

I wish to note that the breadth of the request by the United States Attorney, which certainly magnifies the concerns expressed by the various plaintiffs' attorneys and their attorneys and legal workers, which is to prohibit all parties to the litigation, their attorneys, and legal workers from even speaking --

THE COURT: No. I'm not going to issue that kind of an order, I'm sure of that;

that's why I'm going to rescind Judge Young's order, because it goes way beyond the issues, as I see it.

I certainly am not going to issue that kind of a prohibition.